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Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information After a Death or Divorce

Sarah Bolling Mancini* and Alys Cohen**

Abstract

The death of a borrower too often brings the surviving spouse or other heirs to the brink of foreclosure. Transfer of the marital home to a non-borrower spouse through divorce may lead to the same problems. Mortgage servicers tell these successor homeowners that because they are not the borrower on the loan, they are not entitled to any information about the mortgage secured by their home and cannot apply for a loan modification, even if they are struggling with the payments. In fact, successors have a right to information, the right to assume liability for the loan, and the right to apply for a modification.

In the midst of the foreclosure crisis, many academics have examined state-specific laws, mortgage securitization, and the financial incentives that impede efforts to mitigate foreclosures. No scholarly paper has explored the legal issues affecting successor homeowners who seek information and payment relief after a transfer of the family home. This Article provides a

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This Article draws heavily on analysis and writing by Diane E. Thompson while she was of counsel to the National Consumer Law Center through June 2014. Diane's prescient scholarship and advocacy on these issues developed and tested the key arguments and empowered legal advocates to save the homes of countless successors from foreclosure.

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comprehensive discussion of the federal privacy regulations, statutory limits on enforcement of due-on-sale clauses (specifically the exceptions contained in the Garn-St Germain Act), state contract law, and federal loan modification programs that determine the rights of this vulnerable population. In a time of increased focus on regulation of mortgage lenders and servicers, we also recommend policy changes that would clarify existing rights and better prevent avoidable foreclosures.

I. INTRODUCTION

Geraldine Bates lost her husband Robert, a World War II veteran,[1] on February 1, 2011.[2] The couple had been struggling to pay the mortgage on their home in Jacksonville, Florida.[3] Mr. Bates had fought hard to obtain a trial loan modification, but he passed away before he could make the first payment.[4]

Determined to save the home she and her husband had shared, Mrs. Bates notified the mortgage company, HSBC, of Robert's death and sent the first trial payment of $1,125.47.[5] Mrs. Bates was "devastated" when HSBC returned her payment, indicating that it could not accept the payment from her because Mrs. Bates "was not on the mortgage."[6] HSBC told her that she could not get help until her name was added to the mortgage, but she could not add her name to the mortgage until the loan was brought current—a financial impossibility for the struggling widow.[7] At seventy years old, Geraldine Bates was terrified that she might lose her home.[8]

1. Jessica Silver-Greenberg, *Mortgage Catch Pushes Widows into Foreclosure*, N.Y. TIMES (Dec. 1, 2012), http://www.nytimes.com/2012/12/02/business/widows-pushed-into-foreclosure-by-mortgage-fine-print.html?_r=0.

2. *Robert Bates Obituary*, FLA. TIMES-UNION (Feb. 5, 2011), http://www.legacy.com/obituaries/timesunion/obituary.aspx?n=robert-bates&pid=148350069.

3. Silver-Greenberg, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Geraldine Bates's story is all too common.[9] For older homeowners, the death of a spouse or long-term partner is both a foreseeable and potentially life-shattering event.[10] Beyond the deep emotional loss, the death of a spouse or partner results in loss of income and financial disruption.[11] With a two-income household reduced to one, the surviving homeowner often needs to change the loan's terms, referred to as a mortgage modification, particularly if the couple was struggling financially before the spouse's passing or if there are large outstanding medical bills or funeral expenses.[12]

Children or other relatives who inherit a home after the borrower's death may also find themselves in need of a modification.[13] Perhaps the children moved in to care for their aging parents, with the understanding that the house would be theirs, or perhaps the family resources were always pooled towards a family homestead. In any event, a mortgage borrower's death can precipitate a financial crisis, as well as an emotional one, for the heirs to the family home.[14]

Even without death, a family breakup or divorce can lead to a homeowner struggling to maintain the family home on a reduced income.[15] At best, the financial resources of one household are now being stretched to cover two, and often the remaining homeowner must make ends meet without any contribution from the departing family member.[16] This can bring a family recovering from violence or trauma to the brink of foreclosure.[17]

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9. *See id.* (documenting the phenomenon of a growing number of widows losing their home to foreclosure because mortgage servicers refuse to allow them to modify their mortgages); *see also CFPB Bulletin 2013-12: Implementation Guidance for Certain Mortgage Servicing Rules*, CONSUMER FIN. PROTECTION BUREAU 3 (Oct. 15, 2013) [hereinafter *CFPB Bulletin 2013-12*], http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.

10. Warren S. Hersch, *Loss of Spouse Engenders Financial Hardship for Most Widows [Infographic]*, LIFEHEALTHPRO (Nov. 21, 2014), http://www.lifehealthpro.com/2014/11/21/loss-of-spouse-engenders-financial-hardship-for-mo?t=life-planning-strategies.

11. *See id.*

12. *See* Silver-Greenberg, *supra* note 1.

13. *CFPB Clarifies Mortgage Lending Rules to Assist Surviving Family Members*, CONSUMER FIN. PROTECTION BUREAU (July 8, 2014), http://www.consumerfinance.gov/newsroom/cfpb-clarifies-mortgage-lending-rules-to-assist-surviving-family-members/.

14. *See* Hersch, *supra* note 10.

15. Daniel Bahls, *Splitting the Baby: Avoiding Foreclosure when Homeowners Have Uncertain or Conflicting Interests*, 36 W. NEW ENG. L. REV. 261, 269 (2014).

16. *See id.*

17. *See id.*

This Article addresses the legal rights of these successor homeowners. In this Article, the term "successor homeowner" or "successor" describes any person who becomes an owner of the home pursuant to a transfer in which the creditor is not permitted under federal law to exercise the due-on-transfer clause in the mortgage.[18] This includes any "transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety"; "transfer to a relative resulting from the death of a borrower"; "transfer where the spouse or children of the borrower become an owner of the property"; transfer resulting from a divorce decree, legal separation agreement, or incidental property settlement agreement; or "transfer into an inter vivos trust in which the borrower is and remains a beneficiary" and occupancy of the property does not change.[19] In all of these cases—unlike ordinary, arms-length transactions in which a new owner takes over the home and mortgage—the creditor cannot terminate the mortgage and foreclose but must accept the new owner and allow the new owner to assume the mortgage note should the new owner so choose.[20]

Unfortunately, mortgage servicers routinely refuse to provide information or modify mortgages in these situations.[21] Servicers will refuse to modify mortgages even for successor homeowners who were originally co-borrowers on the loan, claiming that the signature of the deceased borrower is also needed to modify the mortgage.[22] A strong legal advocate can usually overcome this kind of servicer error.[23] But to a successor homeowner who was not originally a borrower on the mortgage loan,

18. *See* Francis Antonio & Sarah Mancini, February 2015 Newsletter, Cal. Homeowner Bill of Rights (Feb. 27, 2015) [hereinafter February 2015 Newsletter] (on file with authors).

19. 12 U.S.C. § 1701j-3(d) (2012).

20. *Application of Regulation Z's Ability-to-Repay Rule to Certain Situations Involving Successors-in-Interest*, CONSUMER FIN. PROTECTION BUREAU 5 (July 11, 2014), http://files.consumerfinance.gov/f/201407_cfpb_bulletin_mortgage-lending-rules_successors.pdf.

21. Mortgage servicers are the entities that accept payments and handle correspondence with mortgage borrowers on behalf of the loan owners. Mortgage servicers often have no legal interest in the payments on the loan but are entrusted with all of the administration relating to the loan. *See generally* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 4, 69 (2011) ("[I]n reference to individual loans, servicers do not have a meaningful stake in the loan's performance.").

22. *See, e.g.*, *Examples of Cases Where Successors in Interest and Similar Parties Faced Challenges Seeking Loan Modifications and Communicating with Mortgage Services*, NAT'L CONSUMER L. CTR. 12 (July 1, 2014) [hereinafter *Examples*], https://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/successor-stories-2014.pdf.

23. *See id.*

servicers tend to give an unrelenting refrain: "You are not entitled to any information about the loan, and you cannot apply for a loan modification."[24]

The servicer's refusal is often baffling to homeowners who want only to keep paying their bills and stay in their homes. At times, a surviving spouse, who is more likely to be a woman based on longer life expectancies with disparate access to credit,[25] is surprised to learn that although she shared in the responsibility of paying the mortgage each month for so many years, she was never a "borrower" on the loan and is now treated as a stranger, unable to even access an account statement.[26] Sometimes servicers refuse to accept payments from the surviving spouse, triggering a subsequent default.[27] Inevitably, grieving homeowners find themselves confronting a bureaucratic maze.

This Article will discuss the successor homeowner's rights in the event of death, divorce, or other family dissolution. We survey successor homeowners' ability to obtain information regarding their mortgages and, if they so desire, assume mortgages and apply for a loan modification. For many homeowners, the first step is gaining access to basic information. Until homeowners know how much is owed and what the existing payment terms and status are, they cannot make decisions about whether they want to keep the home and whether to assume personal liability for the mortgage

24. *See, e.g.*, *A Snapshot of Compliance with CFPB Servicing Standards: Are Mortgage Servicers Following the New Rules?*, NAT'L COUNCIL LA RAZA & NAT'L HOUSING RESOURCE CTR. 7 (Jan. 9, 2015) [hereinafter *Snapshot*], http://www.nclr.org/Assets/uploads/Publications/mortgageservicesreport_11215.pdf; *Chasm Between Words and Deeds X: How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities*, CAL. REINVESTMENT COALITION 20–23 (May 2014) [hereinafter *Chasm X*], http://www.calreinvest.org/system/resources/W1siZiIsIjIwMTQvMDUvMTkvMjJfMjFfMDhfOTc1X0NSQ19SZXBvcnRfQ2hhc21fQmV0d2Vlbl9Xb3Jkc19hbmRfRGVlZHMucGRmIl1d/CRC%20Report%20Chasm%20Between%20Words%20and%20Deeds.pdf; *Chasm Between Words and Deeds IX: Bank Violations Hurt Hardest Hit Communities*, CAL. REINVESTMENT COALITION 14–15 (Apr. 2013) [hereinafter *Chasm IX*], http://www.calreinvest.org/system/resources/W1siZiIsIjIwMTMvMDQvMDIvMjJfMTVfMzNfNjI3X0NoYXNtX0J3X1dvcmRzX2FuZF9EZWVkc19JWF9GaW5hbF9SZXBvcnQucGRmIl1d/Chasm%20Bw%20Words%20and%20Deeds%20IX%20Final%20Report.pdf.

25. Robert Powell, *True Love Means Planning Ahead*, MARKETWATCH (Nov. 13, 2007, 12:44 PM), http://www.marketwatch.com/story/ten-ways-husbands-can-help-their-wives-survive-widowhood ("In fact, 80% of women live longer than their spouses, and often by many years, on average 14, according to the U.S. Census Bureau.").

26. *See Examples*, *supra* note 22.

27. *Servicer Tricks During Modification*, ADVOC. LEGAL, http://www.advocatelegal.org/foreclosure/lender-violations/servicer-tricks-during-modification/ (last visited Oct. 21, 2015).

debt.[28] Homeowners' interest in their homes will generally be subject to the mortgage debt, and they will lose their home to foreclosure if that debt is not repaid.[29] Without assumption, however, they bear no personal liability for the debt.[30] Even before assumption, homeowners need and deserve full access to information on the loan encumbering their home, including information about the possibility of a loan modification if the loan payment is not affordable.[31]

Servicers offer a number of reasons—including privacy concerns, banking regulations, due-on-sale clauses in the mortgage contract, and alleged restrictions on assumption of a mortgage loan—for why they cannot communicate with successor homeowners about the mortgages secured by their homes or evaluate them for modifications.[32] A successor is often told that she cannot apply for a loan modification to reduce her payment because she is not the borrower and cannot become the borrower because she is not "qualified" to assume the loan.[33]

None of these impediments expressed by the servicers are real. In Part II of this Article, we explore the scope and immediacy of the problems that successor homeowners face and the importance of solving these problems. Part III explains that the applicable privacy regulations do not prevent mortgage servicers from providing information to successor homeowners who have documented—to the extent necessary—their successor status; rather, these successors have the right to obtain information about the mortgage secured by their home. Part IV describes the common law right to freely assume a mortgage where there is no enforceable due-on-sale clause. We point out that restrictions on assumption, such as requiring a loan to be current or forcing the assuming party to "qualify" for the assumption, do not apply in the context of a transfer covered by the Garn-St Germain Act.[34] In

28. *See infra* notes 73–79 and accompanying text.

29. *See* Michele Lerner, *Risks of Walking Away from Mortgage Debt*, BANKRATE, http://www.bankrate.com/finance/mortgages/risks-of-walking-away-from-mortgage-debt-1.aspx (last visited Oct. 26, 2015).

30. *See Assumption of Mortgage*, REALTOWN, https://www.realtown.com/words/assumption-of-mortgage (last visited Oct. 26, 2015).

31. *See infra* Part V.

32. *See infra* Part III.

33. *See infra* Part IV.

34. Rep. St Germain, after whom the Act is named, chose to spell his name without the period in St Germain. Jess Bidgood, *Fernand St Germain, Legislator Tied to S.&L. Crisis, Dies at 86*, N.Y. TIMES (Aug. 21, 2014), http://www.nytimes.com/2014/08/22/us/politics/fernand-st-germain-

Part V, we discuss loan modification availability and other loss mitigation options available to successor homeowners. In Part VI, we explore the analogous issue of treatment of a delinquent mortgage loan by a non-borrower homeowner in a Chapter 13 bankruptcy plan. In Part VII, we briefly address the problems surviving spouses and other heirs of reverse mortgage borrowers face. Finally, we conclude in Part VIII with policy recommendations for cutting the Gordian knot faced by successor homeowners who wish to keep their homes.

II. THE SCOPE OF THE PROBLEM

One of the still-unsolved problems revealed by the recent financial crisis is the challenge of keeping your home if you are a successor homeowner whose name is not on the mortgage loan.[35] Clarifying the rights of these successors to deal with the mortgages secured by their homes is particularly important because a substantial number of these homeowners are currently facing foreclosure due to widespread confusion about the overlapping laws at play.[36] Attorneys and counselors representing homeowners continue to cite this as one of the most difficult problems that stymies their attempts to save homes from foreclosure.[37] In response to these concerns, the Consumer Financial Protection Bureau (CFPB) issued new proposed regulations under the Real Estate Settlement Procedures Act (RESPA) in November 2014, to be finalized in 2016, that attempt to address the successor problem.[38] These proposed regulations do not go far enough, and, without the important adjustments we recommend in this Article, the proposed regulations will fail to resolve the successor quagmire.[39]

Even as the number of loans in default and foreclosure continues to decline, foreclosure rates remain above historic pre-recession levels,[40] and

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congressman-tied-to-savings-and-loan-crisis-dies-at-86.html?_r=0.

35. *Comments to the Consumer Financial Protection Bureau Regarding Harms to Successor Homeowners*, NAT'L CONSUMER L. CTR. (Oct. 8, 2014), http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/comments-cfpb-successors-harms.pdf.

36. *See Snapshot*, *supra* note 24; *Chasm X*, *supra* note 24.

37. *See Snapshot*, *supra* note 24; *Chasm X*, *supra* note 24.

38. Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement and Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 74,176 (Dec. 15, 2014).

39. *See infra* Part VIII.

40. *1.1 Million U.S. Properties with Foreclosure Filings in 2014, Down 18 Percent from 2013 to*

some states are seeing an uptick as lenders attempt to clear foreclosure backlogs.[41] The significant number of homes that remain underwater compromises our nation's return to a healthy, minimal number of foreclosures.[42] Through the first quarter of 2015, 10.2% of homes with a mortgage were carrying mortgage debt in excess of the property value.[43] This represents a substantial group of homeowners for whom refinancing is virtually impossible. Other homeowners face foreclosure because of lost income or unexpected medical expenses, making current mortgage payments unaffordable.[44] For many of these households, the death of a borrower or a family breakup will inevitably lead to a successor homeowner struggling to communicate with the mortgage servicer in an attempt to save the home from foreclosure.[45]

Consumer advocates have been sounding the alarm over problems faced by successor homeowners for the past two years by asking lawmakers and regulators to ensure that successors have access to information and the ability to apply for a loan modification after a death or divorce.[46] Often referred to as the "widows and orphans" problem, this has been one of the

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Lowest Level Since 2006, REALTY TRAC (Jan. 14, 2015), http://www.realtytrac.com/news/foreclosure-trends/1-1-million-u-s-properties-with-foreclosure-filings-in-2014-down-18-percent-from-2013-to-lowest-level-since-2006/.

41. Eli Segall, *Home Repossessions Are Rising as Banks Start to Clear Out Foreclosure Backlog*, VEGASINC (June 26, 2015, 2:00 AM), http://vegasinc.com/business/real-estate/2015/jun/26/rising-home-repossessions-are-more-about-backlog/.

42. *See* Peter Dreier, Saqib Bhatti, Rob Call, Alex Schwartz & Gregory Squires, *Underwater America: How the So-Called Housing "Recovery" Is Bypassing Many American Communities*, HAAS INST. 4, http://diversity.berkeley.edu/sites/default/files/HaasInsitute_UnderwaterAmerica_PUBLISH_0.pdf (last visited Oct. 27, 2015).

43. *Equity Report: First Quarter 2015*, CORE LOGIC 3 (June 16, 2015), http://www.corelogic.com/research/negative-equity/corelogic-q1-2015-equity-report.pdf.

44. Alan Zibel, *Unaffordable Mortgages Are Becoming Burden for Minorities*, LAWRENCE J.-WORLD (Jan. 19, 2009), http://www2.ljworld.com/news/2009/jan/19/unaffordable-mortgages-are-becoming-burden-minorit/.

45. *See Chasm X*, *supra* note 24.

46. Consumer Fin. Prot. Bureau, *Atlanta, GA Field Hearing on Mortgage Servicing*, YOUTUBE (Jan. 18, 2013), https://www.youtube.com/watch?v=b4xdb1NKNAI; *Letter Regarding Widows and Orphans, Joint Tenants and Loan Modification Challenges*, CALIF. REINVESTMENT COALITION 1–2 (Dec. 10, 2012), http://calreinvest.org/system/resources/W1siZiIsIjIwMTQvMDUvMTcvMjFfNDNfNDZfMzEyX1dpZG93ZWRfSG9tZW93bmVyX0xldHRlcl8xMi4xMC4yMDEyLnBkZiJdXQ/Widowed%20Homeowner%20Letter%2012.10.2012.pdf; *see also* Ams. for Fin. Reform, *Top Priorities for CFPB Servicing Regulations*, NAT'L CONSUMER L. CTR. (Apr. 2014), http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/recommend-cfpb-servicing-april2014.pdf.

most pernicious and persistent problems homeowners and their advocates face in attempting to stop foreclosures.[47] Even where a struggling homeowner might be able to obtain relief from a mortgage company, the successor faces additional hurdles that too often leave that homeowner without any viable options for retaining the home.[48]

Federal agencies and Government-Sponsored Enterprises (GSEs) have gradually taken steps to address the problem. In February 2013, GSEs Fannie Mae and Freddie Mac changed their servicing rules to require servicers of loans held by these GSEs to evaluate successor homeowners for loan modification options as if they were the original borrower.[49] The Treasury Department followed suit in August 2013 by adding language to the Making Home Affordable Handbook that requires successor homeowners to be evaluated for Home Affordable Modification Program (HAMP) loan modifications.[50]

The CFPB took action to address this problem in January 2013 when it issued a servicing regulation under RESPA that requires servicers to identify and communicate with the successor in interest after learning about the death of the borrower.[51] The CFPB noted that it had received information about the difficulties faced by successors in interest and believed it was essential that servicers develop policies and procedures to better address this problem.[52] In October 2013, the CFPB issued a bulletin further clarifying how servicers could comply with 12 C.F.R. § 1024.38(b)(1)(vi), stating that

47. Brittany McCormick, *The "Widows & Orphans" Problem: The Improper Exclusion of Successors-in-Interest from the Loss Mitigation Process*, 33 CAL. REAL PROP. J. 8, 8 (2015).

48. Dina ElBoghdady, *With Clock Ticking on Mortgage Relief, Homeowners Wonder What's Ahead*, WASH. POST (Mar. 10, 2014), http://www.washingtonpost.com/business/economy/with-clock-ticking-on-mortgage-relief-homeowners-wonder-whats-ahead/2014/03/10/8482830e-a2df-11e3-a5fa-55f0c77bf39c_story.html.

49. *See, e.g.*, Tracy Hagen Mooney, *Freddie Mac Bulletin 2013-3 to Freddie Mac Servicers*, FREDDIE MAC (Feb. 15, 2013) [hereinafter *Freddie Mac Bulletin 2013-3*], http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1303.pdf; Gwen Muse-Evans, *Lender Letter LL-2013-04 to All Fannie Mae Single-Family Servicers*, FANNIE MAE 1 (Feb. 27, 2013), https://www.fanniemae.com/content/announcement/ll1304.pdf.

50. *Supplemental Directive 13-06: Making Home Affordable Program—Administrative Clarifications*, MAKING HOME AFFORDABLE (Aug. 30, 2013), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1306.pdf.

51. 12 C.F.R. § 1024.38(b)(1)(vi) (2015); *see* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696 (Feb. 14, 2013) (to be codified at 12 C.F.R. pt. 1024).

52. 12 C.F.R. § 1024.38(b)(1)(vi).

it "received reports of servicers either outright refusing to speak to a successor in interest or demanding documents to prove the successor in interest's claim to the property that either do not exist . . . or are not reasonably available."[53]

In November 2014, the CFPB issued proposed regulations under RESPA that would substantially expand the rights of successor homeowners.[54] The CFPB explained that it continued to receive reports of difficulties faced by successors attempting to save their homes, despite the CFPB rule that took effect in January 2014.[55] Under the proposed rule, successor homeowners would have access to the servicing protections of RESPA and the Truth in Lending Act (TILA) once the mortgage servicer confirmed their successor status.[56] While it represents a substantial step forward, this proposed rule still falls short of what is needed to protect this vulnerable population.

Actions taken by federal agencies to date have not resolved the problems faced by successor homeowners.[57] Homeowner advocates, including attorneys and the nonprofit housing counselors who assist with the submission of loan modification packages, still report widespread stonewalling and obfuscation by servicers as they attempt to help successors obtain information about the relevant mortgage and apply for needed modifications.[58] In one study, 63% of housing counselors surveyed reported that servicers rarely or never had policies in place to facilitate communication with successors in interest of deceased borrowers.[59] A survey of housing counselors and legal services attorneys in California found that 87% of respondents stated that the "widows and orphans problem persists, and more needs to be done."[60] Only 13% of respondents stated that

53. *CFPB Bulletin 2013-12*, *supra* note 9, at 2.

54. *See* Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement and Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 74,176 (Dec. 15, 2014).

55. *Id*.

56. *Id*. at 74,181.

57. *NCLC Survey Reveals Ongoing Problems with Mortgage Servicing*, NAT'L CONSUMER L. CTR. 2 (May 2015), http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/ib-servicing-issues-2015.pdf.

58. *Id*. at 1.

59. *Snapshot*, *supra* note 24.

60. *Chasm X*, *supra* note 24.

the recent rule changes by the GSEs and the CFPB had solved the problem.[61] In 2013, the same annual survey found that 44% of California advocates responding to the survey said "servicers 'always' or 'almost always' refuse to discuss loan modifications" with clients who are widows if they are not listed on the loan.[62]

The number of successors facing foreclosure as a result of confusion in this area will only grow in the coming years, and this issue will grow in importance as a cause of avoidable mortgage foreclosures.[63] As the baby boomer generation continues to age, a significant number of older homeowners will experience the death of a spouse or partner.[64] Forty-nine percent of households with residents in their fifties are comprised of a married couple without children in the house while sixty percent of households with residents in their eighties consist of a single person living alone.[65] Due to longer life expectancies, women make up three-quarters of this group.[66] Because of historical disparate access to credit, a large number of women who will become the sole owners of homes upon the deaths of their spouses are not the original borrowers on the loans.[67] These widows will often experience a loss of income along with the loss of their partner; therefore, loan modification and assumption are critical steps needed to prevent foreclosure.[68]

Moreover, for the substantial number of households whose homes are underwater, refinancing will be impossible for years to come.[69] Many heirs or divorced spouses, who in the past would have refinanced to put the mortgage in their name, are not going to be able to do so for the next

61. *See id.*

62. *Chasm IX*, *supra* note 24, at 2.

63. *See Housing America's Older Adults: Meeting the Needs of an Aging Population*, JOINT CTR. FOR HOUSING STUD. HARV. U. 7–8 (Sept. 2, 2014), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing_americas_older_adults_2014.pdf.

64. *Id.*

65. *Id*.

66. *Id*.

67. *See* Drew Harwell, *Widows Face Foreclosure Due to Mortgage Catch-22*, TAMPA BAY TIMES (Dec. 27, 2012, 6:12 PM), http://www.tampabay.com/news/business/realestate/widows-face-foreclosure-due-to-mortgage-catch-22/1267935.

68. *Id.*

69. Carolyn Said, *Refis on Underwater Jumbo Loans Nearly Impossible*, SFGATE (June 23, 2012, 6:44 PM), http://www.sfgate.com/realestate/article/Refis-on-underwater-jumbo-loans-nearly-impossible-3657762.php.

decade.[70]

Ultimately, it makes no sense to distinguish a homeowner's rights to information and mortgage modification based on whether the homeowner was an original borrower on the note.[71] Where successor homeowners seek information or modification, their requests should be evaluated using the same standards as those used for any other homeowner.[72] Foreclosing on a homeowner who is willing to pay solely because she is a surviving spouse or became the homeowner after family dissolution is both inhumane and unsound economic policy. In the next Part, we explain why privacy concerns should not be a barrier to allowing successors to access information about the mortgage secured by their home.

III. SUCCESSOR HOMEOWNERS HAVE A RIGHT TO INFORMATION

When a borrower dies, becomes incapacitated, or relinquishes the home in a divorce proceeding, the successor homeowner must, at a minimum, take over management of financial accounts.[73] Even when all goes well, the successor needs to know how much the monthly payments are and where to send them.[74] The successor may want to pay off the mortgage or may have questions about how the escrow is calculated; however, this may not go according to the successor homeowner's plan and the successor homeowner may not be able to make the payments on the mortgage as structured.[75] In this case, the successor will need to decide whether it makes sense to assume the mortgage with a modification of terms, try to sell the house through a short sale or deed-in-lieu of foreclosure, or simply let the foreclosure proceed.[76] To make those decisions, the successor homeowner needs to

70. *See* Tony Guerra, *Can Heirs Refinance the Market Value of a Reverse Mortgage?*, SFGATE http://homeguides.sfgate.com/can-heirs-refinance-market-value-reverse-mortgage-46946.html (last visited Oct. 27, 2015).

71. *CFPB Bulletin 2013-12*, *supra* note 9.

72. *See infra* Part III.

73. *CFPB Bulletin 2013-12*, *supra* note 9.

74. *See id.*

75. *When Paying the Mortgage Is a Struggle*, FED. TRADE COMMISSION (Aug. 2009), http://www.consumer.ftc.gov/articles/0187-when-paying-mortgage-struggle.

76. *See, e.g.*, Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445, 462 (S.D. Tex. 2012) ("This means that Mrs. Brush had several options. She could: (1) let Wells Fargo foreclose on the Property; (2) make mortgage payments without assuming the underlying debt; or (3) assume the underlying debt based on the terms in the original mortgage documents.").

know the loss mitigation options that are available and the balance on the mortgage.[77] Servicers routinely refuse to provide information to successor homeowners in all these situations.[78] Homeowners often are not told the balance on the mortgage, the status of the escrow account, or the available terms of loss mitigation.[79] Requests for a payment history or a correction of errors in the application of payments are stymied.

Servicers sometimes invoke consumer privacy in refusing to provide this information and, in particular, rely on the provisions of the federal Gramm-Leach-Bliley Act (GLBA).[80] The introductory section of the GLBA proclaims: "It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information."[81] But these general, pro-consumer privacy protections should not bar successor homeowners from accessing the information they need to make decisions about their homes and the debt secured by those homes.

In general, under the GLBA, covered financial institutions may not disclose a customer's "nonpublic personal information" to a "nonaffiliated third party."[82] This leads to two questions in the context of successor homeowners: Is the information about the mortgage terms and balance of the mortgage "nonpublic information" whose disclosure would violate the terms

77. *See* McGarvey v. JP Morgan Chase Bank, N.A., No. 2:13-cv-01099-KJM-EFB, 2013 WL 5597148, at *1–2 (E.D. Cal. Oct. 11, 2013) (order granting in part and denying in part Chase's motion to dismiss asserting the daughter, who was not a borrower on the note, paid thousands of dollars in an attempt to keep the home while waiting for Chase to provide her with information about the mortgage and available loss mitigation options and noting that the home was lost at a foreclosure sale); *CFPB Bulletin 2013-12*, *supra* note 9, at 3 (discussing the need for servicers to have policies and procedures in place to provide information to successor homeowners on account information and loss mitigation options).

78. *See, e.g.*, *McGarvey*, 2013 WL 5597148, at *1 ("While treating plaintiff as the borrower for purposes of foreclosure, defendant intermittently refused to communicate with plaintiff for any other purpose because she was not the borrower."); *CFPB Bulletin 2013-12*, *supra* note 9, at 2 (noting that guidance was adopted after receiving "reports of servicers either outright refusing to speak to a successor [homeowner] or demanding documents to prove the successor [homeowner]'s claim to the property that either do not exist (e.g., probate court documents for an estate that is not required to go through probate) or are not reasonably available").

79. *See CFPB Bulletin 2013-12*, *supra* note 9, at 2–3 (providing that successors in interest must be given information regarding the status of the mortgage).

80. 15 U.S.C. § 6801(a) (2012).

81. *Id*.

82. *Id.*

of the GLBA? And are successor homeowners "nonaffiliated third parties" to whom covered financial institutions cannot disclose?

Most of the information sought by successor homeowners is unlikely to strike ordinary people as private information about anyone other than the successor homeowner. Often, successor homeowners are seeking generic information that will enable them to manage the inherited financial obligations, including information about where to send payments, how payments are applied, and the availability and process for obtaining a loan modification.[83] The original borrower's private financial information—including credit score, income, and expenses—is less relevant to the successor homeowner than information about the servicers' policies and procedures.[84] Successor homeowners may also be seeking to provide their own personal financial information to the servicer to enable an assumption, a loan modification, or a transfer of a homeowner's insurance policy, or they may be seeking information about the balance of the mortgage encumbering their home.[85] Only the home's mortgage balance should fall within the purview of GLBA-covered information, and even there, the mortgage balance on the successor's home is, first and foremost, the successor's private financial information.[86] The GLBA does not prevent the disclosure of a person's private financial information to that person, but only to third parties.[87] When successor homeowners seek information about the mortgage on their home, an ordinary, common-sense understanding of privacy suggests that it is the privacy of successor homeowners that is at stake. If that is the case, the GLBA should not prevent the provision of necessary information to successor homeowners.

The existence of a mortgage lien on the home is not private because mortgages, or deeds of trust, are public documents.[88] The consumer's name

83. *See CFPB Bulletin 2013-12*, *supra* note 9, at 3.

84. *See id.* at 3–4.

85. *See id.* at 2.

86. *See* Lamarque v. Centreville Sav. Bank, 22 A.3d 1136, 1141 (R.I. 2011) (finding the disclosure of a senior mortgage payoff amount to a purchaser of the junior mortgagee's interest did not violate the GLBA and was not an invasion of the homeowner's privacy interest because the junior mortgage purchaser held a vested property interest).

87. *See* 15 U.S.C. § 6802(a).

88. *See* Wright v. Bank of Am., No. 3:14-cv-94-RJC-DCK, 2014 WL 1775992, at *3 n.1 (W.D. N.C. May 5, 2014) ("Deeds of Trust are public records."); Lingad v. Indymac Fed. Bank, 682 F. Supp. 2d 1142, 1146 (E.D. Cal. 2010) ("The Deed of Trust and Assignment of Deed of Trust are publicly recorded documents . . . .").

and address and the fact that the consumer's interest in the home is subject to a mortgage is all publicly available information at the local land records office and is therefore excluded from the GLBA's protections.[89]

But mortgages do not contain the critical payment terms,[90] nor do they disclose the balance owed on the mortgage.[91] Balance and payment history on an account are generally private under the GLBA regulations.[92] However, this information is not private once the foreclosure process is initiated.[93] In nearly half of all states, foreclosure is judicial, which means that the foreclosure is initiated by the filing of a public lawsuit.[94] The initial complaint must reveal the date, delinquency amount, and outstanding balance in order to state a cause of action.[95] Even if the foreclosure is conducted through a power-of-sale provision in the mortgage or deed of trust, information about the foreclosure will be made publicly available through publication in newspapers advertising the sale without the benefit of judicial review.[96] Providing this information in a public forum but not to a

89. 12 C.F.R. § 1016.3(p)(2)(i) (2015). As of August 2014, pursuant to the Dodd-Frank Act, authority to promulgate rules implementing the GLBA has been transferred from the Federal Reserve to the CFPB. *Privacy of Consumer Financial Information*, FED. RES. 1, http://www.federalreserve.gov/bankinforeg/caletters/CA_15-7_Letter_Regulation_P_Privacy_Examination_Procedures.pdf (last visited Oct. 27, 2015).

90. The payment terms are memorialized in the note, which is not recorded, and not the mortgage, which is often recorded. *See What's the Difference Between a Mortgage & a Note?*, STOPFORECLOSUREFRAUD (Mar. 3, 2010), http://stopforeclosurefraud.com/2010/03/03/whats-the-difference-between-a-mortgage-a-note/.

91. 12 C.F.R. § 1016.3(q)(2)(i)(B).

92. *Id*.

93. *Id.* §1016.14(b)(2)(vi)(a) (providing that disclosing information as necessary to collect accounts does not violate the GLBA); *see, e.g.*, Lamarque v. Centreville Sav. Bank, 22 A.3d 1136, 1141 (R.I. 2011) (finding disclosure of payoff amount of senior mortgage to purchaser of junior mortgagee's interest does not violate the GLBA and is not an invasion of homeowner's privacy interests); *cf.* Dunmire v. Morgan Stanley DW, Inc., 475 F.3d 956, 961 (8th Cir. 2007) (finding brokerage account information lost its private character when the account holder filed a complaint against his brokerage firm and because delivering that information was part of an "appropriate and acceptable method of settling or collecting a debt it believed [plaintiff] owed—a valid exception under the GLBA").

94. John Rao & Geoff Walsh, *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections*, NAT'L CONSUMER L. CTR. (Feb. 2009), http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf.

95. *See, e.g.*, 735 ILL. COMP. STAT. 5/15-1504 (2013) (setting out a form complaint).

96. *See* JOHN RAO ET AL., FORECLOSURES AND MORTGAGE SERVICING § 8.2.3 (5th ed. 2014) ("Nearly all states require some form of public notice, either by legal advertisement in a newspaper or posting in a public place.").

homeowner who is trying to reinstate the mortgage violates both common sense and the underlying policy rationale for the GLBA because public disclosure of a threatened foreclosure may trigger calls from opportunists hoping to cash in on an anxious and desperate homeowner and sometimes even identity theft.[97] In these circumstances, homeowners are better served by the direct provision of information from their servicers rather than receiving it from a third party primarily interested in separating the homeowner from her remaining savings.[98]

Information about the availability of loss mitigation is also not private information.[99] Most information about loss mitigation options is available in some public forum, even if figuring out which options are available in a particular case is challenging at best.[100] To the extent loss mitigation options invoke privacy concerns, it is the successor homeowner, not the original borrower, whose privacy is at risk, because the successor will be required to submit her financial information.[101] Successor homeowners will need to provide information to the servicer about their own income and expenses; the income and expenses of the original borrower are beside the point.[102]

Some information sought is arguably nonpublic personal financial information, implicating GLBA protections, such as the disclosure of the payment history on a pre-foreclosure account. However, disclosure of mortgage-related information to successor homeowners is not disclosure to a stranger or, using the GLBA language, a nonaffiliated third party.[103] Whether or not the successor homeowner was a party to the original

97. *See, e.g.*, *Mortgage Relief Scam*, FED. TRADE COMMISSION (May 2012), http://www.consumer.ftc.gov/articles/0100-mortgage-relief-scams ("Fraudsters use a variety of tactics to find homeowners in distress. Some sift through public foreclosure notices in newspapers and on the internet or through public files at local government offices, and then send personalized letters to homeowners.").

98. *See id*.

99. *See, e.g.*, MAKING HOME AFFORDABLE, MAKING HOME AFFORDABLE PROGRAM: HANDBOOK FOR SERVICERS OF NON-GSE MORTGAGES 49–50 (Mar. 3, 2014) [hereinafter MHA HANDBOOK], https://www.hmpadmin.com//portal/programs/docs/hamp_servicer/mhahandbook_44.pdf

100. *See, e.g.*, *id*.

101. *See id*.

102. *See id*.

103. *How to Comply with the Privacy of Consumer Financial Information Rule of the Gramm-Leach-Bliley Act*, FED. TRADE COMMISSION (July 2002) [hereinafter *How to Comply*], https://www.ftc.gov/tips-advice/business-center/guidance/how-comply-privacy-consumer-financial-information-rule-gramm.

transaction, the terms of the mortgage and note are her own personal financial information, not those of a third party.[104] The successor homeowner owns the collateral, and her rights are subject to the mortgage.[105] In seeking information about the mortgage—whether the escrow balance, the payoff amount, or the loss mitigation options—the successor homeowner is seeking her own personal financial information. Reliance on the GLBA in this context is misplaced.[106]

Moreover, disclosure of this information falls cleanly within exceptions to GLBA protections.[107] The GLBA has several exceptions where disclosure is permitted: the consumer requests the transaction,[108] the consumer gives "consent or [disclosure is] at the [consumer's] direction,"[109] disclosure is in connection with servicing the consumer's account,[110] disclosure is to the consumer's legal representative, or disclosure is to someone with a "beneficial interest relating to the consumer."[111] Requests for information are likely to fit within all of these exceptions.

Transfers to successor homeowners are often pursuant to a transaction requested by the consumer or at the consumer's consent or direction.[112] The successor homeowner is, in many cases, only the successor homeowner by virtue of some agreement with the original borrower.[113] Whether the successor homeowner acquires her interest through a judicial deed after divorce, upon death, or via a transfer during life from her spouse—done for

104. *See* Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445, 471 (S.D. Tex. 2012) (finding homeowner who inherited a home from her elderly father had a right to assume mortgage, did assume mortgage through execution of loan modification agreement, and was therefore "an individual who has a consumer debt" under the Texas Debt Collection Act).

105. *See CFPB Bulletin 2013-12*, *supra* note 9.

106. *See supra* notes 79–80 and accompanying text; *see, e.g.*, Lamarque v. Centreville Sav. Bank, 22 A.3d 1136, 1141 (R.I. 2011) (finding disclosure of payoff amount of senior mortgage to purchaser of junior mortgagee's interest does not violate the GLBA and is not an invasion of a homeowner's privacy interests because of the vested property interest held by the purchaser of the junior mortgage).

107. 15 U.S.C. § 6802(e) (2012).

108. *Id*. § 6802(e)(1).

109. *Id*. § 6802(e)(2).

110. *Id*. § 6802(e)(1)(B).

111. *Id*. § 6802(e)(3)(D)–(E).

112. *How to Comply*, *supra* note 103.

113. Diane E. Thompson, *Getting Loan Mods for Successors in Interest*, NAT'L CONSUMER L. CTR. (May 22, 2014), https://www.nclc.org/images/pdf/conferences_and_webinars/other_webinars/2014/getting_a_loan_mod_for_successors_in_interest.pdf.

estate planning purposes or to recognize a new marriage—the successor becomes the successor homeowner through a transfer of rights by, or on behalf of, the original borrower.[114] In many of these cases, the original borrower will be providing clear direction, such as through a will or a transfer during life to a spouse or child.[115] Where the transfer occurs through a divorce settlement or intestate succession, the original borrower's consent is, as a legal matter, implied. In both cases, the law directs an outcome on behalf of the original borrower.[116] Where the successor homeowner seeks information pursuant to such a transfer, the GLBA provides an exception to its information-sharing restrictions.[117] Servicers are empowered to share all necessary information with the successor to effectuate the transfer.[118]

Successors will often be operating explicitly as the original borrower's legal representative because a court may have appointed them, such as in a divorce or probate proceeding, or they may be fulfilling their duties under an agreement with the original borrower.[119] The information the successor homeowner seeks is based on her beneficial and legal interest in the collateral property for the account and her fiduciary and legal representation of the original borrower in connection to the transfer of that property.[120] Successor homeowners fall clearly into the GLBA exception for persons acting in a representative capacity for the consumer, or "holding a legal or beneficial interest relating to the consumer,"[121] in many, if not all, cases.

The two main GSEs, Fannie Mae and Freddie Mac, support the secondary market for home mortgages by establishing requirements for mortgage servicing.[122] Both Fannie Mae and Freddie Mac have extensive guidance about the treatment of successor homeowners.[123] Freddie Mac's

114. *Id.*

115. *Your Children*, FIDELITY, https://www.fidelity.com/estate-planning-inheritance/estate-planning/beneficiary-strategies/child (last visited Oct. 27, 2015).

116. *See, e.g.*, Colfax v. JP Morgan Chase Bank, N.A., No. 14-CV-760-GKF-PJC, 2015 WL 3620987 (N.D. Okla. June 9, 2015).

117. 15 U.S.C. § 6802(e)(1) (2012).

118. *See id.*

119. *See, e.g.*, Zadrozny v. Bank of N.Y. Mellon, 720 F.3d 1163, 1166 (9th Cir. 2013) ("The deed of trust allowed for appointment of a successor trustee . . . .").

120. 15 U.S.C. § 6802(e).

121. *Id.* § 6802(e)(3)(D)–(E).

122. *See, e.g.*, RAO ET AL., *supra* note 96, § 5.11.1.

123. *Id.*

guidance explicitly addresses the need for the servicer to provide the successor homeowner with information.[124] Without discussing the GLBA, Freddie Mac requires its servicers to provide whatever information is necessary "to allow the transferee to continue making Mortgage payments or to process a request by the transferee to assume the Mortgage, if applicable."[125] Freddie Mac thus mandates the disclosure of information to successors—in part because providing the information is necessary for servicing the account, ensuring the steady flow of payments, and completing a transfer initiated by the original borrower.[126]

The GLBA and other privacy concerns do not block the disclosure of information necessary to allow the successor homeowner to evaluate her responsibilities under the mortgage and take on those responsibilities.[127] The GLBA provisions are largely irrelevant in the case of successor homeowners who seek information about the extent of their own financial obligations, including the debt owed on their own homes.[128] The GLBA has so little to say about what information should be provided to successor homeowners that Freddie Mac does not take the time to address it when mandating that servicers provide successor homeowners with information about the mortgage.[129] As with many objections raised by servicers in response to requests for assistance from successor homeowners, the GLBA and privacy concerns are red herrings.

In the next Part, we will discuss the successor homeowner's rights to formally take on the responsibilities of the mortgage, including the payment obligation. This right of assumption is a long-standing right under common law.[130] Servicers' refusal to recognize assumptions by successor homeowners is yet another false trail.

IV. SUCCESSOR HOMEOWNERS HAVE A RIGHT TO ASSUME THE MORTGAGE

Once a successor has obtained basic information and established communication with a mortgage servicer, the successor will be in a position

124. *See Freddie Mac Bulletin 2013-3*, *supra* note 49.
125. *See id.*
126. *Id*.
127. *See* 15 U.S.C. § 6802(e)(3)(D)–(E) (2012).
128. *See id.*
129. *See Freddie Mac Bulletin 2013-3*, *supra* note 49.
130. *See infra* Part IV.B.

to decide whether or not to continue paying on the mortgage, with or without a modification.[131] Usually, in order to process a modification, the servicer will require that the successor assume the deceased spouse's obligation on the mortgage.[132] Mortgagees will often insist on assumption in order to maintain privity of contract between the mortgagee and the person on whose behalf the successor is modifying the mortgage.[133]

Sometimes, servicers attempt to block these assumptions and refuse to evaluate the successor for a modification because the mortgage is in default or the successor cannot qualify to assume the loan on its existing terms.[134] As we explain in this Part, servicers have no legal basis to limit or condition assumption of the loan by a successor homeowner in death or divorce transfers. Indeed, the bulk of relevant case law involves the inverse: a creditor attempting to force the assumption of a mortgage by a successor homeowner in order to access another source of funds to pay the mortgage debt.[135] Creditors and their agents are powerless both to mandate an assumption by a successor homeowner and to block it.

A. How Assumption Works

Whenever a homeowner acquires title to the property, that ownership interest may be subject to a mortgage or other liens.[136] The mortgage may be a prior mortgage, as in the case of surviving spouses or children who inherit a family home, or a mortgage taken out to finance the acquisition of

131. *See* February 2015 Newsletter, *supra* note 18.

132. *Id.*

133. *Id.*

134. *Id.*

135. *See, e.g.*, Fed. Land Bank of Omaha v. Houck, 4 N.W.2d 213, 215 (S.D. 1942); Elliott v. Denver Joint Stock Land Bank, 110 P.2d 979, 980 (Colo. 1941); Bay v. Williams, 1 N.E. 340, 340–41 (Ill. 1884), *overruled by* Olson v. Etheridge, 686 N.E.2d 563, 570 (Ill. 1997); Hamilton Co. v. Rosen, 191 A. 255, 257 (R.I. 1937).

136. In general, mortgages form a lien on the title of the property. Tom Streissguth, *What Does It Mean to Put a Lien on a House?*, SFGATE, http://homeguides.sfgate.com/mean-put-lien-house-8014.html (last visited Oct. 27, 2015). In some states, title is transferred to a trustee for the mortgage holder, but the trustee holds title in a fiduciary capacity—the beneficial owner remains the homeowner and the full legal title reverts to the homeowner upon payoff of the mortgage. *See, e.g.*, Faneuil Inv'rs Grp., Ltd. P'ship v. Bd. of Selectmen, 913 N.E.2d 908, 913–14 (Mass. App. Ct. 2009), *aff'd*, 933 N.E.2d 918 (Mass. 2010) (discussing the differences between title theory and lien theory related to mortgages).

the property, as in most home purchases.[137] In general, if there is a pre-existing mortgage in place at the time the homeowner acquires an ownership interest in the property, that ownership interest is subject to the mortgage.[138] If the mortgage debt is not paid, the mortgage may be foreclosed and the property taken to satisfy payment of the debt.[139] The new homeowner has a significant stake in ensuring the payment of the mortgage debt.[140] The new homeowner does not necessarily, however, have any personal, legal obligation to pay the debt.[141] Only if the homeowner assumes the mortgage debt is the homeowner personally liable on the debt.[142]

Before proceeding further, we will revisit the legal distinction between the mortgage and the note. We commonly use the word "mortgage" to refer both to the mortgage, or deed of trust, and the note. They are, however, two different legal documents.[143] The note is the legal obligation to pay, and with it flows personal liability for the debt.[144] The mortgage provides an

137. 46 AM. JUR. 2D *Mortgages* § 1021 (2014).

138. *Id*.

139. *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.2 cmt. b (1997) [hereinafter RESTATEMENT MORTGS.] ("A non-assuming transferee has the risk of loss of title to the real estate by foreclosure if the secured obligation is not performed . . . .").

140. *See* 46 AM. JUR. 2D, *supra* note 137, § 1021.

141. *See* McVeigh v. Mirabito, 556 So. 2d 1226, 1227 (Fla. Dist. Ct. App. 1990) ("The use of the words 'subject to' the mortgage in the absence of contrary language on the deed, eliminates the personal liability of the grantee to pay the indebtedness which the mortgage secures."); Adams v. George, 812 P.2d 280, 284 (Idaho 1991) ("The mere conveyance of mortgaged property 'subject to' an existing encumbrance granted to secure an existing mortgage does not constitute an assumption of personal liability by the purchaser."); Vaughn v. SecurityNational Mortg. Co., No. 14-11-00488-CV, 2012 WL 3016859, at *3 (Tex. App. July 24, 2012) (holding transferee "of property securing a mortgage is not obligated to pay the mortgage simply because title is acquired with knowledge or notice of its existence or because the purchaser agreed to take the encumbered property"); Kan. City Life Ins. v. Hudson, 71 S.W.2d 574, 576 (Tex. Civ. App. 1934); Fluke Capital & Mgmt. Servs. Co. v. Richmond, 724 P.2d 356, 362 (Wash. 1986) (finding purchase of property without more does not equate to personal assumption of liability for debt); RESTATEMENT MORTGS., *supra* note 139, § 5.2 cmt. b ("A transferee does not, merely by acquiring mortgaged real estate, become personally liable on the obligation secured by the mortgage. Only an express assumption of liability will have that effect."); 46 AM. JUR. 2D, *supra* note 137, § 1021.

142. *See, e.g.*, Hussey v. Ragsdale, 831 S.W.2d 279, 281 (Tenn. 1992) (finding no personal liability because the mortgage debt was not assumed but rather taken subject to the mortgage); 13 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:43 (4th ed. 2014).

143. *See, e.g.*, Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The Ibanez Time Bomb?*, 4 WM. & MARY BUS. L. REV. 111, 131 (2013).

144. John Alper, *Understanding a Mortgage and a Promissory Note,* ALPER L., http://www.alperlaw.com/bankruptcy/chapter-7-bankruptcy/understanding-mortgage-promissory-note/ (last visited Oct. 27, 2015).

enforcement mechanism for nonpayment; the holder of the mortgage may initiate foreclosure and take the home in payment of the debt.[145] In most states, the holder of the note may pursue the former homeowner for any deficiency between the amount of the debt at the time of foreclosure, including costs and fees, and the amount realized by the sale of the home at the forced foreclosure sale.[146]

Thus, when the successor homeowner acquires title to the property, the title is usually subject to the mortgage, except when the successor homeowner had an interest in the land prior to the execution of the mortgage and that interest was not made subject to the mortgage at the time of its execution.[147] If his interest in the land is subject to the mortgage, the successor homeowner can lose the home if the mortgage is not paid.[148] Without assumption, however, the successor homeowner has no personal liability on the note.[149] If there is a foreclosure, the successor homeowner will not have to make up any deficiency, unless he assumes the debt.[150]

The decision to assume, then, is an important one for the homeowner. Once the successor homeowner assumes the debt, she may not be able to escape the debt, even if she loses the home.[151] This decision, to assume or not, is the homeowner's decision to make; the bank cannot force the homeowner to assume the mortgage.[152] An assumption is an agreement between the buyer and the seller, or the original homeowner and successor homeowner, for the new homeowner to assume personal responsibility for payments on the mortgage debt.[153] The mortgagee is a third-party

145. *See* RESTATEMENT MORTGS., *supra* note 139, § 5.2 cmt. b.

146. *See* 46 AM. JUR. 2D, *supra* note 137, § 688 (discussing deficiency judgments); Rao & Walsh, *supra* note 94, at 3–4 (stating deficiency judgments are permitted in thirty-six states).

147. *See* 46 AM. JUR. 2D, *supra* note 137, § 688.

148. *See* RESTATEMENT MORTGS., *supra* note 139, § 4.1 cmt. a.

149. 46 AM. JUR. 2D, *supra* note 137, § 1021.

150. *Id.*

151. *Id.*

152. *See, e.g.*, Elliott v. Denver Joint Stock Land Bank, 110 P.2d 979, 982 (Colo. 1941) (finding against bank despite existence of assumption clause in the deed of transfer because new property owner had no knowledge of the assumption clause).

153. *See, e.g.*, Yasuna v. Miller, 399 A.2d 68, 73 (D.C. 1979) ("In mortgage law, 'assumption' is a term of art, defined by reference to the transaction between buyer and seller . . . . The grantee may . . . specifically agree with the seller to assume personal and primary responsibility for payment of the debt secured by the mortgage.").

beneficiary to this agreement[154] who provides the mortgagee with an additional party to recover from should the debt go unpaid, but this is not an agreement between the mortgagee and the successor homeowner.[155] The mortgagee is largely powerless to either force or block an assumption absent a contractual provision in the note or mortgage—the contract documents—with the original borrower.[156]

The assumption of the legal obligation to pay the mortgage debt is analytically distinct from the assignment of the right to occupy and use the land and receive unencumbered title upon completion of the mortgage payments.[157] But both flow from an agreement between the original homeowner and the successor homeowner and represent a transfer of rights and responsibilities of the original homeowner to the new homeowner under the mortgage contract.[158] Because the creditor is not a party to the agreement between the homeowners, the creditor may not dictate the terms of that agreement, regardless of whether it involves an assumption and assignment or simply an assignment.[159]

Once the successor makes the decision to assume the mortgage, usually in order to obtain a modification to the payment terms of the note, there is no set formula for the successor to assume the legal obligation of the payment of a mortgage note.[160] An assumption need not be in writing.[161] Making

154. *See* RESTATEMENT MORTGS., *supra* note 139, § 5.1 cmt. d.

155. *Id*.

156. *See, e.g.*, Olson v. Etheridge, 686 N.E.2d 563, 568 (Ill. App. Ct. 1997) (holding that contracting parties can change their agreement without the third-party beneficiary's consent, until and unless "the third-party beneficiary, without notice of the discharge or modification, materially changes position in justifiable reliance on the promise, brings suit on the promise or manifests assent to the promise at the request of the promisor or promisee").

157. *See, e.g.*, Davey v. Nessan, 830 P.2d 92, 95 (Mont. 1992) (elaborating on the distinction between assignment of contractual rights and assumption of contractual duties in the mortgage context).

158. *See* 46 AM. JUR. 2D, *supra* note 137, § 1021.

159. *See, e.g.*, *Olson*, 686 N.E.2d at 569 (holding that contracting parties can change their agreement without the third-party beneficiary's consent until "the third-party beneficiary, without notice of the discharge or modification, materially changes position in justifiable reliance on the promise, brings suit on the promise or manifests assent to the promise at the request of the promisor or promisee").

160. *See, e.g.*, Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445, 462 (S.D. Tex. 2012) (noting the language of assumption "need not be in the form of an Assumption Agreement in order to be effective"); Bayou Land Co. v. Talley, 924 P.2d 136, 152 (Colo. 1996) (en banc) ("Although an assumption agreement must be express and in writing, there is no requirement that any particular language must be used in the granting instrument in order to create an assumption."); Brosseau v.

payments, combined with seeking a modification of the payment terms, may be enough to demonstrate assumption.[162] Signing a modification agreement that includes a promise to pay the modified mortgage may be enough.[163] Negotiating a loan modification and agreeing to make the payments on the note may be enough.[164] Acceptance of a deed that specifies the successor is assuming personal liability for the mortgage may be enough.[165] Nonetheless, although there are no formal words required, the successor's assent to that assumption of legal responsibility for the debt cannot be presumed.[166] Making payments alone, without more, is not enough.[167]

Lowy, 70 N.E. 901, 903–04 (Ill. 1904); Yager v. Rubymar Corp., 230 N.Y.S.2d 609, 615 (Sup. Ct. 1962) (finding transferee homeowner liable for deficiency where there was no express assumption of the debt, but a "covenant to pay," because "it is not necessary, in the absence of any controlling statute to the contrary, that the word 'assume' be used for the establishment of such intent"); RESTATEMENT MORTGS., *supra* note 139, § 5.1 cmt. a.

161. *See* RESTATEMENT MORTGS., *supra* note 139, § 5.1 (noting that the Statute of Fraud, which requires transfers of land to be in writing, does not cover assumptions in most states and assumptions are not transfers of interest in land, but an acceptance of a personal obligation to make payments).

162. *See* Chi. Assets Co. v. Watrous, 262 Ill. App. 254, 264–65 (1931) (finding such conduct ratified terms of deed delivered to the homeowners when the deed said the new homeowners were assuming the mortgage).

163. *See, e.g.*, *Brush*, 911 F. Supp. 2d at 462.

164. *Bayou Land Co.*, 924 P.2d at 152–54; Lillie v. McFarlin, 25 N.E.2d 896, 899 (Ill. App. Ct. 1940). *But see* Allen v. Hoopes, 249 N.W. 570, 572 (Minn. 1933) (finding no assumption where grantee negotiated extension of mortgage but did not make an explicit promise to pay the mortgage).

165. *See, e.g.*, *Chi. Assets Co*., 262 Ill. App. at 261; *cf.* McVeigh v. Mirabito, 556 So. 2d 1226, 1227 (Fla. Dist. Ct. App. 1990) (finding no assumption where deed stated property was taken subject to second mortgage, but no personal liability for second mortgage assumed); Marks v. Muir, 274 N.W. 786, 790 (Mich. 1937) (finding no assumption where acceptance of deed containing assumption clause was disputed and insertion of assumption clause into deed was done without the buyer's knowledge or consent).

166. *See, e.g.*, *Brush*, 911 F. Supp. 2d at 462 ("Authority to assume the mortgage, however, is not actual assumption."); Chelsea Groton Sav. Bank v. Factory Square, Ltd., No. 09 48 76, 1990 WL 279592, at *2 (Conn. Super. Ct. Sept. 5, 1990); Cassidy v. Bonitatibus, 473 A.2d 350, 351 (Conn. Super. Ct. 1984) ("Assumption of a mortgage by a grantee will not be presumed, and an agreement to do so must be established by clear and convincing proof."), *aff'd*, 497 A.2d 1018, 1019 (Conn. App. Ct. 1985); Hennessey v. Rafferty, 61 N.E.2d 409, 409 (Ill. App. Ct. 1945) (abstract) (finding evidence did not support assumption); Hussey v. Ragsdale, 831 S.W.2d 279, 280 (Tenn. 1992) ("To be held personally liable he must in some manner assume the debt. Such liability will not be implied."); Vaughn v. SecurityNational Mortg. Co., No. 14-11-00488-CV, 2012 WL 3016859, at *3 (Tex. App. July 24, 2012) ("[The transferee] of property securing a mortgage is not obligated to pay the mortgage simply because title is acquired with knowledge or notice of its existence or because the purchaser agreed to take the encumbered property."); *cf.* Davey v. Nessan, 830 P.2d 92, 96 (Mont. 1992) (finding in context of land installment contract that "there can be no implied assumption of contractual liabilities in real estate transactions. Because of the complexity of these transactions, the large amounts of money that are typically involved, and the customary presumption

The homeowner may seek the bank's agreement to the assumption.[168] This may be done in order to release the prior homeowner from liability for the mortgage debt, especially in case of divorce, or to ensure that the successor homeowner receives timely notice from the bank in the event of changes to the payment or a default. The ability of the bank to refuse agreeing to the assumption is limited, as discussed in the next section.

B. Transfers of Land and the Common Law Right to Assume the Mortgage

The right to assume a mortgage flows from and follows on the transfer of title in land.[169] Interests in land are freely transferable.[170] While the transfer of a home from one spouse to another or from a parent to a child may be subject to a mortgage, the existence of the mortgage does not by itself prevent the transfer of title.[171] A homeowner does not need to seek consent of the mortgagee in order to transfer her interest in the land.[172]

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that the only obligations are those which have been expressed, a rule that would permit the inadvertent assumption of debt is inappropriate.").

167. *See, e.g.*, Adams v. George, 812 P.2d 280, 284 (Idaho 1991) ("[I]f property is purchased 'subject to' an existing encumbrance, the mere fact that the purchaser makes payments on the existing mortgage does not establish that the purchaser has assumed personal liability for the debt."); Debral Realty, Inc. v. Marlborough Coop. Bank, 717 N.E.2d 1023, 1028 (Mass. App. Ct. 1999) (rejecting bank's claims that when plaintiff made the monthly payments due on the note it assumed that mortgage debt); Tomlinson v. Warner Bros. Theatres, Inc., 9 A.2d 774, 776 (N.J. Ch. 1939) (rejecting lender's contention that payments made by grantee evidenced assumption of payment obligation).

168. *See infra* notes 185–99 and accompanying text.

169. Waddell v. Roanoke Mut. Bldg. & Loan Ass'n, 181 S.E. 288, 291 (Va. 1935) ("A land owner who mortgages that estate is of course personally and primarily bound for the debt incurred. Upon sale to another who as part of the purchase price assumes and promises to pay this indebtedness, that purchaser becomes primarily bound, and the original debtor becomes surety.").

170. *See, e.g.*, Nat'l Mem'l Park v. Comm'r, 145 F.2d 1008, 1015 (4th Cir. 1944) ("[A]n interest in land[] [is] usually irrevocable and freely transferable."); Cottrell v. Nurnberger, 47 S.E.2d 454, 456 (W. Va. 1948) (holding "an interest in land . . . is usually irrevocable and freely transferable").

171. *See, e.g.*, 3 LAWRENCE R. AHERN, III, THE LAW OF DEBTORS AND CREDITORS § 8:10, Westlaw (database updated June 2015) (mortgagors may transfer their property interest); 46 AM. JUR. 2D, *supra* note 137, § 1018.

172. *See, e.g.*, *In re* Smith, 469 B.R. 198, 202 (Bankr. S.D.N.Y. 2012) ("The consent of the Creditor was not required for the transfer of Nevilla Challenger's interest in the home to the Debtor, regardless of whether the mother was alive or whether an estate had been created."); Badran v. Household Fin. Corp., III, No. 279026, 2008 WL 4335098, at *4 (Mich. Ct. App. 2008) (finding mortgagee's sole remedy for unauthorized transfer is to accelerate the note; mortgagee has no authority to void deed); Bermes v. Sylling, 587 P.2d 377, 384 (Mont. 1978); *In re* Fogarty's Estate, 300 N.Y.S. 231, 236 (Sur. Ct. 1937).

When a spouse or parent dies, for example, the title to the land unquestionably transfers without the lender's consent or oversight.[173]

The question is, what happens to the mortgage? Nothing about the transfer itself removes the security interest from the land or erases the homeowner's need to repay the debt.[174] The original homeowner, or the homeowner's estate, must pay off that mortgage—either by continuing to make the payments on the contract or by using the sale proceeds to pay off the mortgage.[175] For many homeowners, it may seem easier to assign their rights and obligations under the mortgage to the new homeowner and have the new homeowner assume the payment obligation.

As a general rule, homeowners are free to do this. Under common law, contracts are freely assignable.[176] Creditors, for example, routinely assign notes and mortgages to third parties, along with the concomitant responsibility to release the mortgage upon full payment.[177] Contracting parties are bound to complete their contract and deliver the widgets required, but they are typically free to have a third party deliver the widgets and accept payment for the widgets, provided the widgets are of the same specifications and delivered in the same manner as called for in the original contract. Most existing mortgage contracts contemplate the possibility of a homeowner's assignment of rights by providing that the contract shall bind the borrower's "successors and assigns."[178]

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173. 46 AM. JUR. 2D, *supra* note 137, § 1020 ("The interest of a mortgagor in mortgaged property is devisable and descendible. It descends to the heirs of the deceased mortgagor, subject to the mortgage . . . . This rule . . . prevail[s] even where the mortgagor dies after a decree of sale in foreclosure, but before the sale is made.").

174. *See, e.g.*, United States v. Rivera Rivera, 671 F. Supp. 886, 887 (D.P.R. 1987); Berg v. Liberty Fed. Sav. & Loan Ass'n, 428 A.2d 347, 349 (Del. 1981).

175. *See, e.g.*, 1 AHERN, *supra* note 170, § 8:10 (cataloguing three ways in which a mortgagor may sell her interest in the land: 1) a transfer of the land subject to the mortgage, with no assumption; 2) a transfer of the land with an assumption of the mortgage; and 3) paying off the mortgage in full at the time of sale of the land).

176. United States v. Doe, 940 F.2d 199, 204 (7th Cir. 1991) ("In general, unless the parties have agreed otherwise, contract rights are freely assignable unless assignment would materially change the duties of the obligor, increase the obligor's risk, or impair the obligor's chance of obtaining return performance.").

177. *See* St. Georges Liquors, Inc. v. Int'l Underwriters, Inc., 1986 WL 4870, at *3 (Del. Ch. Apr. 15, 1986); 1 AHERN, *supra* note 170, § 2:139 ("A significant part of RESPA [Real Estate Settlement Procedures Act] recognizes that mortgage loans are commonly assigned, sold or otherwise transferred after closing and that the lender may not remain the servicer of the loan.").

178. *See, e.g.*, Toone v. Wells Fargo Bank, N.A., 716 F.3d 516, 519 (10th Cir. 2013) (stating that the Deed of Trust provided that its covenants and agreements "shall bind and benefit the successors

There are only three exceptions to the presumption of assignability: (1) the contract is for personal services (if you contract for James Earl Jones to read you a bedtime story, you want James Earl Jones, not the authors of this Article to read to you, however fluent their diction); (2) the assignment is against public policy; or (3) there is a provision in the contract that forbids assignment.[179] Because contracts to pay mortgage obligations are not for personal services, but for the payment of money, and their assignment is not generally against public policy, if a lender wants to ensure performance by the original borrower, the lender must restrict the right of the borrower to assign her rights to third parties in the mortgage contract.[180] Absent such a contractual provision, the lender is powerless to prevent assignment by the borrower and assumption by a third party.[181]

Historically, particularly in periods of rising interest rates, existing homeowners often assigned their mortgage contracts to the new homeowner

and assigns of Lender and Borrower"); Mackenzie v. Flagstar Bank, FSB, No. 11-12014-MBB, 2013 WL 139738 (D. Mass. Jan. 9, 2013) (quoting 2007 Deed of Trust with identical language), *aff'd*, 738 F.3d 486 (1st Cir. 2013); s*ee also* Andrews v. Holloway, 231 S.E.2d 548, 549 (Ga. Ct. App. 1976) (holding that lender's consent to assumption was not required where mortgage contract provided it was binding on the borrower's "assigns"). After 2007, this clause of the Uniform Instrument promulgated by Fannie Mae and Freddie Mac was changed to state that if a successor assumes the obligations of the security instrument in writing "and is approved by Lender," the successor "shall obtain all of Borrower's rights and benefits under this Security Instrument." *See California–Single-Family–Fannie Mae/Freddie Mac Uniform Instrument–Form 3005*, FREDDIE MAC ¶ 13 (2014) [hereinafter *Uniform Instrument*], http://www.freddiemac.com/uniform/doc/3005-CaliforniaDeedofTrust.doc. This change in the form, however, cannot alter the common law rule that contracts are freely assumable and assignable.

179. *See* 6 AM. JUR. 2D *Assignments* § 52 (2014) ("An executory contract may be nonassignable because it involves personal services . . . .").

180. Solomon v. Copping, 112 So. 2d 749, 751 (La. Ct. App. 1959) (holding the plaintiff had "no legal right to object to the assumption of his mortgage by [the third parties]" because "there was no clause prohibiting the contemplated sale and assumption").

181. *See, e.g.*, *id.* ("[I]t is well settled that, where there is in an act of mortgage no statement to the effect that it cannot be assumed without the written consent of the mortgagee, the transfer of property may be made and the mortgage may be assumed . . . ."); L. Klein, Inc. v. Escarra, 122 So. 880, 880 (La. Ct. App. 1929) (finding mortgagee powerless to prevent assumption of mortgage); Bermes v. Sylling, 587 P.2d 377, 384 (Mont. 1978) ("The agreement between the parties contained no prohibition on assignment or transfer of the mortgaged lands. [Defendant] as mortgagee, therefore, could neither disapprove nor interfere with Bermes' attempt as mortgagor to trade the Barber Ranch to [the third party] subject to the mortgage."); Young v. Hawks, 624 P.2d 235, 237 (Wyo. 1981); *cf.* Fed. Nat'l Mortg. Ass'n v. Comm'r, 90 T.C. 405, 415 n.13 (1988) ("Prior to 1972, conventional mortgages frequently contained no 'due-on-sale' clauses, and were freely assumable . . . ."), *aff'd*, 896 F.2d 580 (D.C. Cir. 1990).

and required the new homeowner to assume the mortgage obligations.[182] If the new homeowner could assume the mortgage, that saved on the uncertainty of any financing contingency in the mortgage contract and might save the new purchaser money on the mortgage, too.[183] Transaction costs for both the new homeowner and the existing homeowner were reduced.[184] Existing homeowners who could transfer a home with a low-interest rate mortgage could, and often did, charge a higher price for the sale of the home.[185]

In fact, while lenders may prefer not to permit assumptions, as discussed below, an assumption does not necessarily hurt a lender.[186] Unless a lender agrees to release the original borrower, he (or his estate) remains personally liable for the debt.[187] Creditors, as third-party beneficiaries of the assumption agreement, can pursue both the borrower and the assuming successor in the event of a default,[188] thus increasing the lender's sources of

182. *See, e.g.*, *Fed. Nat'l Mortg. Ass'n*, 90 T.C. at 415 n.13 ("Prior to 1972, conventional mortgages frequently contained no 'due-on-sale' clauses, and were freely assumable, or properties were taken 'subject to' existing mortgages by the purchaser."); *see also* S. REP. NO. 97-536, at 20–21 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3054, 3075; *cf.* Lisa Prevost, *Taking Over a Seller's Loan*, N.Y. TIMES, Sept. 22, 2013, at RE11 (describing the benefits for buyers of assuming mortgages when interest rates are rising).

183. *See* Prevost, *supra* note 182.

184. *See id*. (noting the benefits of assuming a mortgage when interest rates are rising include lower transaction costs, lower interest rates, and shorter amortization schedules).

185. *See, e.g.*, S. REP. NO. 97-536, at 20 (characterizing the ability of existing homeowners to charge a higher sales price where a low-rate mortgage could be assumed as a "problem").

186. *See generally* Ronald L. Cohen, Note, *Judicial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*, 27 STAN. L. REV. 1109, 1111–17 (1975) (discussing the mortgagor's and mortgagee's interests and the impact of due-on-sale clauses on these interests).

187. *See, e.g.*, Bankers Trust Co. of Cal. v. Boydell, 46 Fed. App'x 731, 731 (5th Cir. 2002) (per curiam) (finding homeowner's selling of her interest in the property irrelevant in action to enforce the note); United States v. Rivera Rivera, 671 F. Supp. 886, 887 (D.P.R. 1987); Berg v. Liberty Fed. Sav. & Loan Ass'n, 428 A.2d 347, 349 (Del. 1981); Yasuna v. Miller, 399 A.2d 68, 73 (D.C. 1979); Solomon v. Copping, 112 So. 2d 749, 751 (La. Ct. App. 1959) ("[I]t is well settled that . . . the assumption by the new purchaser in no way relieves the original mortgagor of the mortgage obligation."); L. Klein, Inc. v. Escarra, 122 So. 880, 880 (La. Ct. App. 1929) (finding transferor homeowner not relieved of obligation to pay mortgagor by transferee's assumption of mortgage); W. Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241, 245–46 (Miss. 1986) (finding original debtor, guarantors, and grantee of property who assumed debt all liable in action to collect on promissory note); 46 AM. JUR. 2D, *supra* note 137, § 1031.

188. *See, e.g.*, Bayou Land Co. v. Talley, 924 P.2d 136, 153 n.26 (Colo. 1996) ("A mortgagee is able to enforce an assumption agreement against a grantee of the mortgagor on the theory that the mortgagee is a third party beneficiary of the assumption agreement between the original mortgagor

recovery.[189] In recognition of the benefits assumption can bring to mortgagees, lenders have often sued to try to force the transferee to assume the loan, usually fruitlessly.[190]

Nonetheless, lenders have often resisted honoring assumptions, even when the original borrower remains liable on the note.[191] For a variety of reasons, lenders may not want the ownership interest in the land transferred or the rights and obligations under the mortgage assigned to a third party.[192] Lenders lend to individuals based on their credit profile and the lender's beliefs about how the borrower is likely to use the property.[193] It is, for example, widely believed that individual homeowners will pay the mortgage on their home before they pay the mortgage on their investment properties; therefore, loans secured by owner-occupied property are regarded as safer than loans secured by investment property.[194] Lenders may fear that a transferee owner will impair the security of the property, either by waste of the property or by allowing judgment liens to attach to the property.[195] However, lenders' desire to make new loans and reset their interest rate risk may be the strongest anti-assumption motivation there is.[196] An assumption of a loan during a period of rising interest rates—precisely when

and his or her grantee."); *W. Point Corp*., 506 So. 2d at 245–56 (finding original debtor, guarantors, and grantee of property who assumed debt all liable in action to collect on promissory note); 46 AM. JUR. 2D, *supra* note 137, § 1072; 13 WILLISTON & LORD, *supra* note 142, § 37:43.

189. *See, e.g.*, *Yasuna*, 399 A.2d at 73–74 ("Thus, the existence of an assumption contract . . . does not prevent the mortgagee from proceeding against the mortgagor, and in fact enlarges his remedy by permitting an election to sue mortgagor, grantee or seek foreclosure.").

190. *See, e.g.*, Elliott v. Denver Joint Stock Land Bank, 110 P.2d 979, 980 (Colo. 1941); Bay v. Williams, 1 N.E. 340, 341 (Ill. 1984), *overruled by* Olson v. Etheridge, 686 N.E.2d 563 (Ill. 1997); Hamilton Co. v. Rosen, 191 A. 255, 255 (R.I. 1937); Fed. Land Bank of Omaha v. Houck, 4 N.W.2d 213, 215 (S.D. 1942).

191. *See* Cohen, *supra* note 186, at 1111–17.

192. *See, e.g.*, *In re* Allen, 300 B.R. 105, 119 (Bankr. D.D.C. 2003).

193. *See, e.g.*, Andrews v. Holloway, 231 S.E.2d 548, 549 (Ga. Ct. App. 1976) ("Defendants argue that the transfer to plaintiff, to which defendants did not consent, constituted a default as they were relying on the personal credit and financial strength of Giddens alone."); *cf.* S. REP. NO. 97-536, at 24–25 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3054, 3074–75, 3079 (noting concerns lenders may have about credit quality of assuming homeowners, "occupancy rights" in the property).

194. *Cf.* U.S. DEP'T OF HOUSING AND URBAN DEV., OWNER OCCUPANCY REQUIREMENTS AND EXCEPTIONS (4330.1) ch. 6.4 (1994), http://portal.hud.gov/hudportal/documents/huddoc?id=43301c6HSGH.pdf (restricting rights of non-owner occupants to assume mortgages).

195. *See, e.g.*, Fid. Land Dev. Corp. v. Reider & Sons Bldg. & Dev. Co., 377 A.2d 691, 694 (N.J. Super. Ct. App. Div. 1977).

196. *See* S. REP. NO. 97-536, at 21.

homeowners have the most to gain from bypassing lenders[197]—can squeeze a lender between long-term, low-rate mortgages and its own, much higher, cost of funds.[198] Conversely, making a new loan to that same homebuyer cuts off the creditor's interest rate risk and generates new business and new fees.[199] Lenders are particularly anxious to prevent assumptions and force new loans in the context of rising interest rates.[200]

It was precisely this dialectic—home buyers anxious to assume low-rate mortgages and lenders anxious to force those same home buyers into new, high-rate mortgages—that led to the widespread adoption and enforcement of due-on-sale clauses.[201] When state legislatures and state courts pushed back against the excesses of those clauses and their sometimes harsh results, creditors found a more receptive audience in Congress.[202] The due-on-sale clauses incorporated into most mortgages[203] and the enabling federal legislation, the Garn-St Germain Act, are the subjects of the next section.

C. Due-on-Sale Clauses and the Garn-St Germain Act

In order to restrict assumption by a third party of the borrower's rights and responsibilities, most mortgage contracts restrict transfers of the homeowner's rights and obligations under the mortgage contract by providing that if the homeowner assigns the mortgage or transfers the property without the lender's consent, the mortgage comes due.[204] These clauses are referred to as due-on-sale clauses.[205] A due-on-sale clause in the mortgage gives the mortgagee the right to accelerate the mortgage loan and foreclose upon transfer of the rights and responsibilities of the borrower.[206] This protects the lender from the borrower's presumed lack of interest in

197. *See* Prevost, *supra* note 182.

198. *See* Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 168–69 (1982).

199. *See id.*

200. *See id.* at 168.

201. *See* Arthur J. Margulies, Note, *The Cure and Reinstatement of Mortgages by Third Party Assignees*, 24 CARDOZO L. REV. 449, 455–56 (2002).

202. *See* Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445, 460 (S.D. Tex 2012) ("In response, Congress passed the Ga[r]n-St. Germain Depository Institutions Act, which generally prohibited state laws restricting due-on-sale clauses.").

203. *See id.* ("Due-on-sale clauses have become standard in mortgage agreements.").

204. *Id*. at 459–60; *see Uniform Instrument*, *supra* note 178, ¶18.

205. *See Brush*, 911 F. Supp. 2d at 459–60.

206. *Id*. at 460.

making the payments once the borrower is no longer a resident or the risk of being saddled with an uncreditworthy borrower,[207] and it allows lenders to take advantage of rising interest rates and the opportunity to generate new closing costs by forcing refinancing upon the transfer of the property.[208] A due-on-sale clause in the mortgage is the way lenders attempt to restrict assumptions by third parties because without a due-on-sale clause the lender is powerless to prevent a third party from assuming the borrower's rights and obligations.[209]

State courts have traditionally viewed the exercise of due-on-sale clauses with suspicion, as a restraint on alienation.[210] Many courts require the exercise of a due-on-sale clause to be reasonable under the circumstances and have rejected acceleration in the face of unwanted assumption.[211] As the California Supreme Court ruled:

> Economic risks such as those caused by an inflationary economy are among the general risks inherent in every lending transaction. They are neither unforeseeable nor unforeseen. Lenders who provide funds for long-term real estate loans should and do, as a matter of business necessity, take into account their projections of

207. *In re* Allen, 300 B.R. 105, 119 (Bankr. D.D.C. 2003).

208. *See, e.g.*, W. Life Ins. Co. v. McPherson K.M.P., 702 F. Supp. 836, 839 (D. Kan. 1988) ("Due-on-sale clauses are generally seen as having two purposes: (1) allowing acceleration of a note if the purchaser of the property is not a good risk; and (2) allowing the lender to keep its loan portfolio at current interest rates, thereby protecting its position in the money market."); *see* S. REP. NO. 97-536, at 20–21, 24, 25 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3054, 3074–75, 3079 (noting concerns lenders may have about lack of refinancing at market rates, credit quality of assuming homeowners, and occupancy rights in the property).

209. *See, e.g.*, Andrews v. Holloway, 231 S.E.2d 548, 549 (Ga. Ct. App. 1976) (finding that lender's consent is immaterial if there is no provision in the mortgage providing for acceleration upon transfer because lender cannot then foreclose); Young v. Hawks, 624 P.2d 235, 237 (Wyo. 1981); FANNIE MAE, SERVICING GUIDE: FANNIE MAE SINGLE FAMILY § D1-4.2-01 (Nov. 12, 2014) [hereinafter FANNIE MAE GUIDE], https://www.fanniemae.com/content/guide/svc090915.pdf ("For all other mortgage loans that are not subject to a due-on-sale (or due-on-transfer) provision, there are no restrictions on the transfer of ownership.").

210. *See, e.g.*, Wellenkamp v. Bank of Am., 582 P.2d 970, 974–77 (Cal. 1978).

211. *See, e.g.*, Fogel v. S.S.R. Realty Assocs., 443 A.2d 1093 (N.J. Super. Ct. Ch. Div. 1981) (rejecting exercise of due-on-sale clause where the lender's consent was conditioned on an increase in the interest rate and the clause contained a provision that it would be exercised reasonably); Cont'l Fed. Sav. & Loan Ass'n v. Fetter, 564 P.2d 1013, 1015, 1017 n.4 (Okla. 1977) (collecting cases and finding exercise of due-on-sale clause unreasonable and inequitable when transferee homeowner tendered payments but refused to pay transfer fee $300 in excess of actual costs to mortgagee of transfer).

> future economic conditions when they initially determine the rate of payment and the interest on these long-term loans . . . . [I]t would be unjust to place the burden of the lender's mistaken economic projections on property owners exercising their right to freely alienate their property through the automatic enforcement of a due-on clause by the lender.[212]

Lenders, thwarted by both state courts and state legislatures who restricted the enforcement of due-on-sale clauses, found a more favorable audience in Congress.[213] In 1982, Congress enacted the Garn-St Germain Act,[214] which shifted the balance of power absolutely in favor of lenders and federal banking agencies and away from borrowers, state regulators, and state legislators.[215] The Garn-St Germain Act ushered in an era of massive deregulation of mortgage lending,[216] and the loans authorized under Garn-St Germain turned out to be risky and devastating, triggering this country's largest foreclosure crisis since the Great Depression.[217] Among other provisions, the Garn-St Germain Act preempted state laws forbidding the enforcement of due-on-sale clauses.[218]

The express purpose of this preemption was to prevent new homeowners from assuming existing mortgages without the lender's consent.[219] Lenders were encouraged to continue to give their consent to assumptions,[220] but were no longer required to honor assumptions by third

212. *Wellenkamp*, 582 P.2d at 976.

213. *See, e.g.*, S. REP. NO. 97-536, at 20–21 ("The Committee finds compelling reasons for Congress to address the problems . . . which have arisen from state actions restricting the enforcement of due-on-sale clauses in home mortgages . . . . For lenders, due-on-sale restrictions further extend the lives of older low interest mortgages, and prevent lenders from increasing the yields on those loans at the time the property is transferred."); *see also* RAO ET AL., *supra* note 96, § 8.6.1.

214. Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified as amended at 12 U.S.C. § 1701j-3).

215. *See* RAO ET AL., *supra* note 96, § 8.6.1. *See generally*, Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982).

216. *See* RAO ET AL., *supra* note 96, § 8.6.1.

217. *See* CONG. OVERSIGHT PANEL, FORECLOSURE CRISIS: WORKING TOWARD A SOLUTION 5 (2009), http://www.gpo.gov/fdsys/pkg/CHRG-111shrg47888/pdf/CHRG-111shrg47888.pdf.

218. 12 U.S.C. §1701j-3(b)(1) (2012); W. Life Ins. Co. v. McPherson K.M.P., 702 F. Supp. 836, 840–41 (D. Kan. 1988); McCausland v. Bankers Life Ins. Co., 757 P.2d 941, 942–44 (Wash. 1988).

219. *See* S. REP. NO. 97-536, at 20–25 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3054, 3074–79.

220. 12 U.S.C. § 1701j-3(b)(3) ("[A] lender is encouraged to permit an assumption of a real property loan at the existing contract rate or at a rate which is at or below the average between the

parties.[221] A three-year transition period was provided for states that had restrictions on the enforcement of due-on-sale clauses.[222] Lenders were permitted to qualify transferee homeowners for loans in this "window period," even though they would not otherwise have been able to do so given state law restrictions on the enforcement of the due-on-sale clause.[223]

After the enactment of the Garn-St Germain Act, as a general rule, if a mortgage contains a due-on-sale clause, a borrower may not transfer a property subject to that mortgage without the lender's consent.[224] If a borrower does transfer the property subject to a mortgage containing a due-on-sale clause, then the mortgage company may declare the mortgage contract at an end and demand full repayment of the debt.[225] Lenders are free to, and may, consent to an assumption, but are not required to honor one.[226]

Congress, however, believed there were circumstances that would render blocking the new homeowner's assumption of the existing mortgage "inequitable."[227] These circumstances included the transfers we are concerned with in this Article—where the transfer results from death, divorce, or shifting ownership within a family on residential property with

contract and market rates."); *see* S. REP. NO. 97-536, at 21 ("When enforcing their rights pursuant to a due-on-sale clause, the committee strongly urges lenders and prospective homebuyers to negotiate assumption of an existing mortgage at the original contract rate, or at a blended interest rate."); *see also* 12 C.F.R. § 191.5(b)(3) (2015) (providing that a lender may not enforce a prepayment penalty if it fails to permit an assumption by a creditworthy borrower upon application by the borrower).

221. 12 U.S.C. § 1701j-3(b)(3).

222. *Id*. § 1701j-3(c).

223. *Id*. § 1701j-3(c)(2)(A); S. REP. NO. 97-536, at 24.

224. 12 U.S.C. § 1701j-3(a)(1) (noting a due-on-sale clause is "a contract provision which authorizes a lender . . . to declare due and payable sums secured by the lender's security instrument if all or any part of the property . . . is sold or transferred without the lender's prior written consent"); *see also* 12 C.F.R. § 191.5(b)(v).

225. 12 U.S.C. § 1701j-3(a)(1).

226. *See id*. § 1701j-3(b)(3) (encouraging lenders to give their consent to assumptions); W. Life Ins. Co. v. McPherson K.M.P., 702 F. Supp. 836, 843 (D. Kan. 1988) (finding it reasonable that the mortgagee withheld written consent prior to the sale and lender conditioned consent on increase in the interest rate); c*f.* 12. C.F.R. § 191.5(b)(3)–(4) (forbidding lenders from imposing prepayment penalties upon acceleration of the mortgage when the new homeowner submits a credit application within thirty days of the transfer meeting the lender's underwriting criteria and requiring a lender who agrees to the assumption to forbear from the exercise of the due-on-sale clause and to further release the original homeowner).

227. S. REP. NO. 97-536, at 25.

fewer than five units.[228] The Senate Committee Report states, "it would be unfair and inappropriate for lenders to enforce due-on-sale clauses under [those] circumstances."[229] If the transfer falls within one of the Garn-St Germain exceptions, the mortgagee may not enforce the due-on-sale clause.[230]

Congress made no provision permitting lenders to perform a credit check on these protected homeowners or otherwise review their assumption, unlike its treatment of borrowers during the window period;[231] rather, Congress flatly prohibited the enforcement of due-on-sale clauses in these cases, leaving intact the protected successor's common law right to assume the mortgage rights and obligations.[232] Similarly, the only requirement the Garn-St Germain implementing regulations place on a protected successor who assumes a mortgage is the continuance of pre-existing mortgage insurance.[233] There is no requirement that the protected successor homeowner obtain the creditor's or servicer's permission.[234] The creditworthiness of the homeowner assuming the mortgage is irrelevant; no

228. 12 U.S.C. § 1701j-3(d)(3) (death of joint tenant or tenant by entirety); *id*. § 1701j-3(d)(5) (transfer to a relative upon the borrower's death); *id*. § 1701j-3(d)(6) (transfer to spouse or children of the borrower); *id*. § 1701j-3(d)(7) (divorce or legal separation); *see also* S. REP. NO. 97-536, at 24.

229. S. REP. NO. 97-536, at 24.

230. 12 U.S.C. §1701j-3(d); *see also* Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445, 460 (S.D. Tex. 2012) (holding mortgagee may not enforce due-on-sale clause based on inheritance of family home by daughter); French v. BMO Harris Bank, N.A., No. 12 C 1896, 2012 WL 1533310, at *3–4 (N.D. Ill. Apr. 30, 2012) (finding that successor homeowner protected by Garn has a "federal right" and remanding to bankruptcy court to determine if successor homeowner–the nephew of the original borrower–is indeed protected under Garn-St Germain Act); *In re* Smith, 469 B.R. 198, 202 (Bankr. S.D.N.Y. 2012) (finding lender may not exercise due-on-sale clause upon transfer from mother, now deceased, to daughter); *In re* Cady, 440 B.R. 16, 20 n.9 (Bankr. N.D.N.Y. 2010) (holding mortgagee may not enforce due-on-sale clause in mortgage pre-dating enactment of Garn based on transfer from parents to their son and his wife); *In re* Alexander, No. 06-30497-LMK, 2007 WL 2296741 (Bankr. N.D. Fla. Apr. 25, 2007) (concluding mortgagee may not enforce due-on-sale clause based on transfer on death); *In re* Lumpkin, 144 B.R. 240, 241 (Bankr. D. Conn. 1992) (mortgagee may not enforce due-on-sale clause based on transfer from mother to daughter).

231. *Compare* 12 U.S.C. § 1701j-3(c)(2)(A) (providing that lenders may refuse to honor assumptions for transferee homeowners who do not meet "customary credit" standards, even if the due-on-sale clause would be otherwise unenforceable), *with id.* § 1701j-3(d) (providing that due-on-sale clauses are unenforceable for nine categories of transfers without any provision for credit qualification).

232. *Id.* § 1701j-3(d).

233. 12 C.F.R. § 191.5(c) (2015).

234. *See id*. § 191.5.

new underwriting is required or permitted.[235] By contrast, the implementing regulations expressly contemplate a lender's review of the creditworthiness of a non-protected transferee who seeks to assume the loan and penalize a lender who refuses to allow an assumption by a creditworthy transferee.[236]

Because the due-on-sale clause is the only mechanism a servicer has to block the assumption of the mortgage by the new homeowner, lenders must allow assumptions that fall within one of these exceptions, even if there is an otherwise valid due-on-sale clause in the mortgage.[237] Any provision requiring the lender's approval of an assumption is subject to these same restrictions in the Garn-St Germain Act.[238] Fannie Mae and Freddie Mac recognized this reality by setting up the following two categories of assumptions: one category, often called "qualifying assumptions," that requires approval by Fannie Mae or Freddie Mac and a determination of the new homeowner's creditworthiness; the other category, referred to as "nonqualifying assumptions" or "exempt" assumptions, that is automatic and not subject to review by the servicer, Fannie Mae, or Freddie Mac.[239] These nonqualifying assumptions are assumptions by successor homeowners protected by the Garn-St Germain Act that includes family members

235. *See id*. § 191.5(b).

236. *Compare id.* § 191.5(c) (stating lenders may require successor homeowners to continue mortgage insurance payments), *with id.* § 191.5(b)(3) (providing that a lender may not impose a prepayment penalty if it invokes a due-on-sale clause in the event of a transfer to a creditworthy borrower).

237. *See, e.g.*, Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445, 460 (S.D. Tex. 2012) (finding daughter, who inherited property from her father, had right to assume the mortgage despite existence of due-on-sale clause); FANNIE MAE GUIDE, *supra* note 209 ("Unless the previous borrower requests a release of liability, the servicer must process the following exempt transactions without reviewing or approving the terms of the transfer."); *cf.* Saravia v. Benson, 433 S.W.3d 658, 665 (Tex. App. 2014) (distinguishing *Brush* and finding that there is no right to assume absent one of the Garn protections).

238. *See, e.g.*, *In re* Jordan, 199 B.R. 68 (Bankr. S.D. Fla. 1996) (finding a provision in a veteran's loan that required the Secretary of Veterans Affair's approval for an assumption unenforceable).

239. *See also* Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment at 8–10, Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445 (S.D. Tex. 2012) (No. 10-cv-05016) [hereinafter Brush Reply]. *Compare* FANNIE MAE GUIDE, *supra* note 209, § D1-4.1-02 (exempt transactions which servicer must process without review), *with id.* § D1-4.2-02 (property purchase "must *qualify*," and servicer must submit to Fannie Mae for approval). *Compare* FREDDIE MAC, SINGLE-FAMILY SELLER/SERVICER GUIDE ch. 60.5, 60.6 [hereinafter FREDDIE MAC GUIDE], http://www.freddiemac.com/singlefamily/guide/ (last visited Oct. 28, 2015) (transfers where no approval required), *with id.* at ch. B65.27, B65.29–B65.34 (stating workout assumption option, which "permits a *qualified applicant* to assume title to the property and the Mortgage obligation" upon approval by Freddie Mac (emphasis added)).

acquiring title on death or divorce or a transfer during life to a borrower's spouse or child.[240]

The Garn-St Germain limitations on the exercise of otherwise valid due-on-sale clauses apply to all residential home loans.[241] The Garn-St Germain Act defines "lender" broadly to include any "person or government agency making a real property loan or any assignee or transferee, in whole or in part, of such a person or agency."[242] Real property loans are not limited to loans made by large lenders; they include any loan secured by real property or a manufactured home—including a credit sale—and the homeowner's stock in a cooperative housing corporation.[243]

The Garn-St Germain Act, therefore, forbids the exercise of due-on-sale clauses in the event of a transfer to a relative on the death of a borrower, through divorce, or during life to a spouse or child.[244] If a transfer falls into any of those categories, the lender may not accelerate the mortgage. If the new homeowner wishes to assume the loan, the lender is powerless to prevent it and must honor the assumption whether or not the new homeowner is creditworthy.[245] Servicers often attempt an end run around this result by arguing that assumptions cannot be allowed on loans in default.[246] In doing so, they are conflating the qualifying assumptions where the servicer may ascertain the creditworthiness of the transferee and set conditions on assumptions and the nonqualifying assumptions that occur outside of the servicer's control.[247] We will discuss the assumption of a mortgage after a payment default in the next section.

D. Assumption of the Mortgage After a Payment Default

Servicers routinely tell successor homeowners that they cannot assume a mortgage that is in default or that the mortgage must be reinstated before it can be assumed.[248] The result, failing to allow a modification because the

240. Brush Reply, *supra* note 239, at 8–10.
241. *See* RAO ET AL., *supra* note 96, § 8.6.1.
242. 12 U.S.C. § 1701j-3(a)(2) (2012).
243. *Id*. § 1701j-3(a)(3).
244. *Id*. § 1701j-3(d).
245. *See id.*
246. *See* Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445, 456 (S.D. Tex. 2012).
247. *See* 12 C.F.R. § 191.5(b)(2)–(3) (2015).
248. *Brush*, 911 F. Supp. 2d at 456 (quoting a servicer notice from Wells Fargo that provided "the

mortgage is in default, is bizarre. "[M]ost persons age 50 and older prefer to remain in place" as they age and the emotional need to do so may be particularly strong after a spouse dies.[249] Displacement from the home at a time of great emotional and financial vulnerability can precipitate a downward spiral.[250] Allowing surviving homeowners who can afford a reasonable payment to modify their mortgages makes sense to preserve independence for older Americans and to avoid unnecessary foreclosures. Moreover, to the extent that successor homeowners legally step into the shoes of original borrowers, they are entitled to all the same protections and considerations, including loss mitigation evaluation, as original borrowers.[251]

When servicers refuse to allow assumptions for mortgages in default, they rely on provisions pertaining to assumptions done with the consent of the mortgagee—the "qualifying assumptions" discussed in the previous subsection.[252] But successor homeowner assumptions are different; they are not done with the consent of the mortgagee, but independently of the mortgagee and the mortgagee's consent is not required.[253] The right of a homeowner to sell the home persists through delinquency and up to the foreclosure sale.[254] Default does not terminate the right of the mortgagor to transfer the property or her rights and responsibilities under the mortgage.[255]

Because the homeowner has the right, independent of the servicer, to decide whether or not to assume the mortgage, the servicer cannot block that assumption based on the default status of the mortgage.[256] It is the

loan you have applied to assume must be current during the processing of your application and at the time of any prospective assumption").

249. ANDREW KOCHERA ET AL., AARP, BEYOND 50:05: A REPORT TO THE NATION ON LIVABLE COMMUNITIES: CREATING ENVIRONMENTS FOR SUCCESSFUL AGING 61 (2005), http://assets.aarp.org/rgcenter/il/beyond_50_communities.pdf.

250. *See* Hersch, *supra* note 10.

251. 46 AM. JUR. 2D, *supra* note 137, § 1021.

252. *See* FANNIE MAE GUIDE, *supra* note 209, § D1-4.1-02 (requiring the servicer to process exempt transactions without review); FREDDIE MAC GUIDE, *supra* note 239, at ch. 60.5, 60.6 (requiring no approval for transfers).

253. *See, e.g.*, FANNIE MAE GUIDE, *supra* note 209, § D1-4.1-02 ("[T]he servicer must process [these] exempt transactions without reviewing or approving the terms of the transfer.").

254. *See, e.g.*, *In re* Buchanan, 303 B.R. 199, 201 n.1 (Bankr. N.D. Cal. 2003) ("A trustor under a deed of trust maintains the right to sell or refinance his property, even if he is in default.").

255. *Id*.

256. *See, e.g.*, *In re* Jordan, 199 B.R. 68, 70 (Bankr. S.D. Fla. 1996) (allowing a son who received a 50% ownership interest in the home from his mother after the loan had gone into default to cure the arrearages via a Chapter 13 bankruptcy).

homeowner's right to assume the mortgage, and a homeowner may exercise that right in order to pursue a loan modification before curing any default.[257] Indeed, once the mortgage is assumed, the successor homeowner steps into the shoes of the original borrower, and most mortgages contain a clause requiring that the borrower is afforded an opportunity to cure any default.[258] Additionally, under federal regulations, most homeowners have the right to be evaluated for a loan modification provided that the loan owner has authorized the servicer to offer loan modifications, which the vast majority of loan owners do.[259] Therefore, default status is irrelevant to a successor homeowner's right to assume the loan.

The GSEs, Fannie Mae and Freddie Mac, further undermine servicers' reliance on the canard that default status prohibits assumption. The GSEs specifically permit the assumption of mortgages in default, even by successors who are not protected under the Garn-St Germain Act, as a way of resolving the delinquency on a mortgage.[260] These assumptions require approval by the GSEs, but they are specifically distinguished from assumptions by the Garn-St Germain-protected successors who do not need approval by the GSEs without reference to the delinquency status.[261]

Once the successor homeowner's right to assume is clearly established, even after default, the next question is whether a successor homeowner may also be considered for a loan modification on the same terms as an original borrower. This is the question we address in the next section.

V. SUCCESSOR HOMEOWNERS HAVE THE SAME RIGHT TO BE CONSIDERED FOR A LOAN MODIFICATION AS ORIGINAL HOMEOWNERS

Successor homeowners acquire the basic bundle of rights under the mortgage—the right to undisturbed possession so long as payments on the debt are made and the right to removal of the mortgage lien upon payment in

257. Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445, 445 (S.D. Tex. 2012).

258. *See, e.g.*, *In re* Allen, 300 B.R. 105, 110 (Bankr. D.D.C. 2003) (quoting the Deed of Trust); FREDDIE MAC, CALIFORNIA SINGLE-FAMILY UNIFORM INSTRUMENT 13, http://www.freddiemac.com/uniform/unifsecurity.html (last visited Oct. 28, 2015).

259. 12 C.F.R. § 1024.41 (2015).

260. *See* FANNIE MAE GUIDE, *supra* note 209, § D1-4.1-02; FREDDIE MAC GUIDE, *supra* note 239, at ch. 60.1.

261. *See* FANNIE MAE GUIDE, *supra* note 209, § D1-4.1-02; FREDDIE MAC GUIDE, *supra* note 239, at ch. 60.5, 60.6.

full of the debt—with their accession to title on the land.[262] Assumption creates privity between the successor homeowner and the mortgagee by adding the successor homeowner as a mortgagor to the mortgage contract.[263] Once successor homeowners agree to assume the legal responsibility to pay under the note, successor homeowners step fully into the shoes of the original borrowers and possess all the same legal rights and responsibilities.[264] These include the right to reinstate and cure the default.[265] To the extent the original borrower would be eligible for a loan modification evaluation upon default, the successor homeowner should have that same right of evaluation.

In fact, when the mortgage is in default, allowing successor homeowners to apply for loan modifications may even improve the mortgage holder's bottom line. When the original borrower is gone, the question is whether to allow a delinquent loan to become another bank-owned, vacant property waiting to be sold or to approve a successor homeowner for a loan modification that restores the mortgage as a performing asset on the investor's books. By design, the Fannie Mae, Freddie Mac, and Making Home Affordable loan modification programs only authorize a servicer to approve a loan modification when the modification leads to an affordable payment based on the obligor's verified income and generates a greater net present value than foreclosing.[266] In short, if the stream of payments from the affordably modified loan does not exceed the value the investor would realize through foreclosure, the servicer will deny the modification request. Servicers and investors are no worse off, and perhaps are better served, by allowing successor homeowners to be evaluated for a loan modification.[267]

Courts are just beginning to consider the general rights of homeowners to be evaluated for a loan modification. Indeed, the CFPB's regulations requiring loss mitigation procedures and enforceable by private right of

262. 46 AM. JUR. 2D, *supra* note 137, § 1021.

263. *See* Carpenter v. United States, 69 Fed. Cl. 718, 726 (2006).

264. *See id*. at 724 ("As a general rule, a transferee of mortgaged real property does not 'step in the shoes' of the original mortgagor absent an assumption of the mortgage by the transferee.").

265. *See In re* DiCamillo, 206 B.R. 64, 70 (Bankr. D.N.J. 1997).

266. FANNIE MAE GUIDE, *supra* note 209, § D2-3.2-07; FREDDIE MAC GUIDE, *supra* note 239, at ch. C65.6; MHA HANDBOOK, *supra* note 99, at 49–50.

267. *See generally* Diane E. Thompson, *Foreclosing Modifications*, 86 WASH. L. REV. 755 (2011) (discussing servicer incentives to foreclose rather than modify).

action only took effect in January 2014.[268] There has scarcely been time to reach court decisions on those rules. Extending the evaluation right to successor homeowners is a topic even fewer courts have addressed.

One of the first cases to consider the rights of successor homeowners to evaluation for a loan modification was *McGarvey v. JP Morgan Chase Bank, N.A*.[269] Barbara McGarvey inherited a home as the successor trustee to her mother's trust after her mother, the original borrower, passed away.[270] McGarvey notified Chase of the borrower's death and communicated with Chase for many months in an attempt to obtain a loan modification.[271] Chase sent multiple letters to Berdine Sylvia, McGarvey's deceased mother, as "Berdine Sylvia/Trustee C/O Barbara McGarvey" soliciting a loan modification application.[272] Then Chase sent a loan modification offer letter to "Berdine Sylvia c/o McGarvey."[273] McGarvey signed and returned the modification trial plan offer and made all three payments, only to be told by Chase that she was denied for the modification "because she was not the borrower."[274] The court allowed McGarvey to proceed with claims for negligence and unfair practices and found she had pled facts supporting a breach of the duty of care in the loan modification process.[275] The *McGarvey* court offers an indirect approach to the problem of successor homeowners based on the intuitive unfairness of servicer conduct in these situations,[276] but the court did not conduct an analysis of the underlying legal rights of the parties.[277]

The Texas federal district court in *Brush v. Wells Fargo, N.A.*[278] offers the clearest and most coherent analysis of the relationship between a loan modification and an assumption. In that case, the court found that once the successor—the daughter of the original borrower—assumed, she stepped

268. Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,695, 10,696 (Feb. 14, 2013) (codified at 12 C.F.R. pt. 1024).
269. No. 2:13-cv-01099-KJM-EFB, 2013 WL 5597148, at *1 (E.D. Cal. Oct. 11, 2013).
270. *Id.*
271. *Id.* at *10.
272. *Id.* at *1.
273. *Id.*
274. *Id.*
275. *Id.* at *7, *10.
276. *See id*. at *9–10.
277. *See id.* at *3–9.
278. 911 F. Supp. 2d 445 (S.D. Tex. 2012).

into the shoes of the mortgagor, with all the rights and responsibilities of the original borrower.[279] These rights included the right to cure a default, right to receive a notice of any breach, and full authority to negotiate a loan modification agreement, even though the mortgage was in default at the time.[280] Analytically, this approach makes sense. Upon assumption, the successor homeowner becomes the borrower with all the attendant rights and obligations.[281] Mortgage modifications are routinely negotiated for borrowers who are in default, and the successor status of the borrower is not, in itself, a bar to a "work out" arrangement. At least one bankruptcy court has agreed and permitted the successor homeowner to participate in a court-sponsored loss mitigation program.[282]

In a cursory settlement conference decision, however, a New York state judge dismissed the argument that the Garn-St Germain exclusions give successor homeowners the right to be considered for a loan modification.[283] The homeowner apparently had not assumed the loan in that case, and the judge relied on the lack of privity between the parties in holding that the borrower had no right to be evaluated for a loan modification.[284] The decision leaves open the possibility that if the homeowner had assumed the loan, like the homeowner in *Brush*, the court might have reached a different result.[285] As it stands, the court's decision flies in the face of guidance issued by Fannie Mae, Freddie Mac, and the Treasury Department requiring that successor homeowners be evaluated for a loan modification as if they were the original borrower and that an assumption be processed.[286]

For the programs they oversee, Fannie Mae, Freddie Mac, and the Treasury Department require servicers to evaluate successor homeowners for a loan modification and, if approved, to simultaneously process the

279. *Id*. at 460.

280. *Id.* at 460–66.

281. *See id.*

282. *In re* Smith, 469 B.R. 198, 198 (Bankr. S.D.N.Y. 2012).

283. Generations Bank v. Sciotti, 982 N.Y.S.2d 721, 723 (Sup. Ct. 2014).

284. *But see In re Smith*, 469 B.R. at 198 (rejecting the privity argument in the bankruptcy context and finding that a successor homeowner, protected from the exercise of the due-on-sale clause under the Garn-St Germain Act, was entitled to participate in a court-sponsored loss mitigation program).

285. *See Sciotti*, 982 N.Y.S.2d at 723.

286. Muse-Evans, *supra* note 49, at 1 (successor homeowner must be evaluated for loan modification as if borrower and packet should be forwarded to Fannie Mae for modification review and "related assumption"); FREDDIE MAC GUIDE, *supra* note 239 (requiring simultaneous modification and assumption); MHA HANDBOOK, *supra* note 99, at 129.

modification and an assumption.[287] This requirement is imposed so that successor homeowners can know in advance of assumption whether or not the servicer will approve the homeowner for a loan modification and what the terms of that modification will be.[288] For most homeowners, it makes no sense to assume a mortgage loan that is in default with unaffordable payments unless an affordable loan modification is assured.[289] When servicers require assumption before evaluation and block assumption on the basis of default status, successor homeowners are trapped.[290] Recognizing this Catch-22, Fannie Mae, Freddie Mac, and the Treasury Department in its MHA Handbook have all instituted procedures where a successor homeowner is evaluated for a loan modification before being required to assume the mortgage.[291]

Unfortunately, many servicers have not caught up with these policies and have continued to spread misinformation about the rights of successors to apply for a loan modification before assuming the loan.[292] Successors continue to report being told that the servicer cannot talk with them about the loan or evaluate them for a modification because they are not the borrower, so many successor homeowners have found relief from bankruptcy courts.[293] Filing for bankruptcy de-accelerates the debt, which allows the successor to cure the default.[294] The use of bankruptcy to protect the rights of successor homeowners is the subject of the following Part.

287. Muse-Evans, *supra* note 49, at 1; FREDDIE MAC GUIDE, *supra* note 239; MHA HANDBOOK, *supra* note 99, at 129.

288. *See* Fleet v. Bank of America N.A., 178 Cal. Rptr. 3d 18, 24–26 (Ct. App. 2014).

289. *See* Bonnie Kavoussi, *Mortgage Modification Defaults Occur for 6 in 10 Borrowers, Study Says*, HUFFINGTON POST (June 22, 2012, 2:26 PM), http://www.huffingtonpost.com/2012/06/22/mortgage-modification-default_n_1618877.html.

290. *See* Lisa Prevost, *Guidelines Help Heirs Assume and Modify Loans*, N.Y. TIMES (Nov. 14, 2013), http://www.nytimes.com/2013/11/17/realestate/guidelines-help-heirs-assume-and-modify-loans.html?_r=0.

291. *Freddie Mac Bulletin 2013-3*, *supra* note 49; MHA HANDBOOK, *supra* note 99, at 129; Muse-Evans, *supra* note 49, at 1.

292. *See* Prevost, *supra* note 290.

293. *See infra* Part VI.

294. *See, e.g.*, *In re* Alexander, No. 06-30497-LMK, 2007 WL 2296741, at *1 (Bankr. N.D. Fla. 2007); *In re* Trapp, 260 B.R. 267, 267 (Bankr. D.S.C. 2001).

VI. BANKRUPTCY CAN OFFER HOMEOWNERS AN AVENUE FOR LOAN MODIFICATION WITHOUT ASSUMPTION

Homeowners, whether original borrowers or successors, often turn to bankruptcy to force a loan modification.[295] Bankruptcy offers a relatively friendly forum for homeowners seeking to restructure their debt.[296] For successor homeowners in particular, bankruptcy can short circuit the process of dealing with recalcitrant servicers.[297] Bankruptcy allows successor homeowners to force a modification of the debt without legal assumption of the obligations under the note in most cases.[298]

Individuals typically file for bankruptcy protection under either chapter 7 or chapter 13 of the Bankruptcy Code.[299] In a Chapter 7 case, the debtor's nonexempt assets are liquidated and the proceeds are used to pay creditors.[300] The balance of any debt remaining after any assets are liquidated is discharged.[301] In a Chapter 13 filing, by contrast, "individual debtors may obtain adjustment of their indebtedness through a flexible repayment plan approved by a bankruptcy court."[302] Creditors are paid through the debtor's future income, instead of the debtor's assets, and the debtor is permitted to restructure some debts and retain nonexempt assets.[303] The repayment plan, known as the Chapter 13 plan, gives the debtor three to five years to catch up on delinquent payments on secured debts and, in some cases, to modify the terms of those debts.[304]

Some bankruptcy courts permit successor homeowners to use a Chapter 13 plan to cure and reinstate the mortgage secured by their home after falling

295. RAO ET AL., *supra* note 96, § 10.4.

296. *See* Les Christie, *Bankruptcy Can Save Your House from Foreclosure*, CNN MONEY (July 24, 2010, 10:58 AM), http://money.cnn.com/2010/07/21/real_estate/bankruptcy_and_foreclosure/#.

297. HENRY SOMMER ET AL., NAT'L CONSUMER LAW CTR., CONSUMER BANKRUPTCY LAW AND PRACTICE § 2.3 (10th ed. 2012).

298. *See* Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 570–71 (2009).

299. *See* SOMMER ET AL., *supra* note 297, § 2.2. Individuals also have the right to file under Chapter 11, but for most, the costs of filing under Chapter 11 (typically used by corporate debtors) outweigh the benefits. *Id*. § 6.4.

300. *Id.* § 3.1.

301. *Id*.

302. Nobelman v. Am. Sav. Bank, 508 U.S. 324, 327 (1993).

303. SOMMER ET AL., *supra* note 297, § 6.3.3.

304. *Id*.

behind on the payments.[305] The bankruptcy courts that mandate modification without assumption rely on the successor's ownership interest in the land, securing the loan, and the broad definition of a "claim" Congress established in the Bankruptcy Code.[306]

Mortgage creditors facing a successor homeowner trying to include and cure the debt in a Chapter 13 plan without assumption typically object to confirmation of the plan on the basis of lack of privity.[307] The mortgage creditors note that assumption is a prerequisite for privity and that privity is generally required in order to enforce or modify a contract.[308] They argue that without contractual privity and a "debtor-creditor" relationship between them and the successor homeowner, the mortgagee cannot be forced to participate in the Chapter 13 plan.[309] Mortgagees in this case will usually seek court permission to continue with foreclosure or dismissal of the Chapter 13 case because the debtor has no personal liability on the debt.[310]

Bankruptcy courts have generally rejected this argument. Courts have held that a mortgage meets the definition of a claim under the Bankruptcy Code and is subject to inclusion in a Chapter 13 plan even where the debtor is not the original borrower and bears no personal liability for the debt.[311] These courts base their reasoning on the broad definition of a bankruptcy claim established in *Johnson v. Home State Bank*, which held that the debtor could treat a mortgage arrearage in a Chapter 13 plan even after receiving a discharge of personal liability on the debt in a prior Chapter 7 case.[312] In *Johnson*, the Supreme Court held that a claim subject to inclusion in a bankruptcy reorganization plan included an in rem claim, or right to payment from the debtor's property.[313] The *Johnson* Court noted that Congress intended the definition of a claim to include "all interests having the relevant attributes of nonrecourse obligations regardless of how these

305. *See, e.g.*, *In re* Hutcherson, 186 B.R. 546, 546 (Bankr. N.D. Ga. 1995) (son inherited home from mother); *In re* Lumpkin, 144 B.R. 240, 240 (Bankr. D. Conn. 1992) (daughter received home by quitclaim deed from mother).

306. *See In re Hutcherson*, 186 B.R. at 546; *In re Lumpkin*, 144 B.R. at 240.

307. *See* Rebecca B. Connelly, *Can a Debtor Use Chapter 13 to Restructure Someone Else's Debt?*, 30-JUN AM. BANKR. INST. J. 50, 51 (2011).

308. Carpenter v. United States, 69 Fed. Cl. 718, 727 (2006); *see supra* Part III.

309. *Carpenter*, 69 Fed. Cl. at 723.

310. *See* Connelly, *supra* note 307, at 51.

311. *See* Johnson v. Home State Bank, 501 U.S. 78, 83–84 (1991).

312. *Id.*

313. *Id*. at 83–88.

interests come into existence."[314] Focusing on this broad language, courts in *In re Lumpkin* and *In re Hutcherson* determined that *Johnson* controlled in a situation where the debtor sought to treat the mortgage on the home she had received through inheritance or a borrower-to-child transfer as a claim in her Chapter 13 bankruptcy case.[315]

Other courts have followed suit, concluding that a successor may provide for a mortgage in a Chapter 13 plan because a bankruptcy claim includes a right to payment against the property, even where the debtor has no personal obligation to pay the debt.[316] These courts have dismissed creditors' contention that there is a lack of contractual privity between the successor and the mortgagee.[317] As one court held, "the Bankruptcy Code recognizes a debtor-creditor relationship whenever a creditor holds a claim secured by the debtor's property."[318] This logic reaches beyond the protected classes created under the Garn-St Germain Act to any person whose property is encumbered by a debt to which the property owner is not a party.[319]

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314. *Id.* at 86–87.

315. *In re* Hutcherson, 186 B.R. 546, 547–48 (Bankr. N.D. Ga. 1995) (son inherited home from mother); *In re* Lumpkin, 144 B.R. 240, 241 (Bankr. D. Conn. 1992) (daughter received home by quitclaim deed from mother). Cases decided pre-*Johnson*, and those which fail to engage with *Johnson*'s broad definition of a "claim," are of little precedential value. *See, e.g.*, *In re* Mitchell, 184 B.R. 757 (Bankr. C.D. Ill. 1994) (relying on pre-*Johnson* cases to conclude that there was no "debtor-creditor relationship" and thus granting relief from stay).

316. *See, e.g.*, *In re* McNeal, No. 3:11-bk-3148-PMG, 2011 WL 4381725, at *3 (Bankr. M.D. Fla. Sept. 1, 2011) (finding son who inherited a one-tenth interest in the home from his mother and subsequently received quit claim deeds from four of nine co-owners could include mortgagee's claim in his bankruptcy plan); *In re* Nunnery, No. 11-80267, 2011 WL 4712083, at *4 (Bankr. M.D.N.C. Aug. 17, 2011) (allowing debtor to pay off manufactured home loan in Chapter 13 even though debtor lacked privity with mortgagee and assignee of mortgagee was equitably estopped from denying debtor's ownership interest where it had accepted payments from her for seven years); *In re* Lozada, 446 B.R. 604, 606 (Bankr. M.D. Fla. 2011) (allowing claim to be included on basis of quitclaim deed from a stepsister, which is not a protected category under the Garn-St Germain Act, while noting that the debtor may have acquired her interest upon her mother's death, which would be a protected category under the Garn-St Germain Act); *In re* Flores, 345 B.R. 615, 615 (Bankr. N.D. Ill. 2006); *In re* Trapp, 260 B.R. 267, 268 (Bankr. D.S.C. 2001).

317. *See, e.g.*, *In re* Allen, 300 B.R. 105, 117 n.19 (Bankr. D.D.C. 2003) ("If a daughter inherits a home (a transfer excepted by 12 U.S.C. § 1701j-3(d)(6) from being a ground for accelerating the mortgage) is she to be precluded by 'lack of privity' from using chapter 13 to save the house from foreclosure when she defaults in making mortgage payments?").

318. *In re* Curinton, 300 B.R. 78, 82 (Bankr. M.D. Fla. 2003) (quoting *In re* Garcia, 276 B.R. 627, 631 (Bankr. D. Ariz. 2002)).

319. *See* 12 U.S.C. § 1701j-3 (2012).

Not all bankruptcy courts, however, have accepted this broad reasoning. Some courts have refused to allow a transferee to include the mortgage claim in a bankruptcy plan where the transfer violates an enforceable due-on-sale clause.[320] These courts have expressed concern that confirmation of a plan by the successor homeowner would impermissibly modify the creditor's rights.[321] Section 1322(b)(2) of the Bankruptcy Code bars confirmation of a plan that modifies the rights of the holder of a claim secured only by the debtor's principal residence.[322] The rights that are protected from modification include the rights provided for in the mortgage contract that are enforceable under state law.[323] Thus, a number of bankruptcy courts have held that allowing confirmation of a bankruptcy plan would impermissibly modify the creditor's right to enforce the due-on-sale clause where a successor homeowner obtained his interest through a transfer that violated an enforceable due-on-sale clause.[324] Of course, even under this theory, there must actually be some modification to the creditor's rights. Some courts have refused to find any modification of the creditor's rights where the creditor has not accelerated the loan based on the due-on-sale clause violation.[325] At least one court has gone so far as to hold that a violation of a due-on-sale clause may be cured in a bankruptcy plan without modification of the secured creditor's rights.[326]

In re Allen exemplifies the predominant reasoning of bankruptcy courts that refuse to allow inclusion of a mortgage in a Chapter 13 plan by a transferee where the due-on-sale clause has been violated.[327] The court in *In re Allen* reasoned that if a transfer has triggered a valid due-on-sale clause, that default cannot be cured by merely catching up on payments over time.[328]

320. *See infra* note 324 and accompanying text.

321. *See infra* note 324 and accompanying text.

322. 11 U.S.C. § 1332 (2012).

323. Nobelman v. Am. Sav. Bank, 508 U.S. 324, 329 (1993).

324. *In re* Mullin, 433 B.R. 1, 1 (Bankr. S.D. Tex. 2010); *In re* Tewell, 355 B.R. 674, 674 (Bankr. N.D. Ill. 2006); *In re* Allen, 300 B.R. 105, 105 (Bankr. D.D.C. 2003); *In re* Martin, 176 B.R. 675, 675 (Bankr. D. Conn. 1995); *In re* Threats, 159 B.R. 241, 241 (Bankr. N.D. Ill. 1993).

325. *In re* Trapp, 260 B.R. 267, 268 (Bankr. D.S.C. 2001); *In re* Rutledge, 208 B.R. 624, 629 (Bankr. E.D.N.Y. 1997).

326. *In re* Garcia, 276 B.R. 627, 642 (Bankr. D. Ariz. 2002) (determining that a violation of a due-on-sale clause could be cured by protecting the lender's collateral and increasing the interest rate if market rates have risen).

327. *In re Allen*, 300 B.R. at 105.

328. *Id.* at 111–12.

Rather, a default based on an impermissible transfer can only be cured by rescinding the transfer and putting the prior owner back on title.[329] The *Allen* court concluded that to allow a transfer of the property in violation of a due-on-sale clause, without the lender's consent, would impermissibly modify the rights of a secured creditor under section 1322(b)(2).[330] The court relied on the provision in the deed of trust forbidding de-acceleration when acceleration resulted from the lender exercising its option to accelerate the debt after a transfer of the property without its consent.[331] The court presumed that the lender's exercise of that option was valid, and, in fact, the transfer at issue was not an exempt transfer under the Garn-St Germain Act.[332] The court suggested, however, that the result would have been different if the transfer had been among those protected from the lender's exercise of a due-on-sale clause by the Garn-St Germain Act.[333]

Similarly, the court in *In re Threats* reasoned that an enforceable due-on-sale clause was part of the bundle of rights the secured creditor had bargained for at the time the loan contract was created, and these rights could not be forcibly modified without violating the Bankruptcy Code.[334]

Even these courts recognize that a right must be enforceable in order to

329. *Id*. *But see In re Garcia*, 276 B.R. at 642 (determining that violation of a due-on-sale clause could be cured by protecting the lender's collateral and increasing the interest rate if market rates have risen).

330. *In re Allen*, 300 B.R. at 119; *see also In re* Threats, 159 B.R. 241, 243 (Bankr. N.D. Ill. 1993).

331. *In re Allen*, 300 B.R. at 111 ("Deed of Trust [paragraph] 18 provided that the borrower's right to reinstate 'shall not apply in the case of acceleration under' . . . paragraph 17 [of] the due-on-transfer clause . . . ." (footnote omitted)).

332. *Id*. at 119.

333. *Id*. at 117 & n.20. Additionally, there are decisions which permitted cure and reinstatement after a transfer that are distinguishable from Mrs. Allen's case because the transfer in each case, as a matter of non-bankruptcy law, did not constitute a basis for acceleration and there was no prior failed bankruptcy case by the original owner. *See In re* Lippolis, 216 B.R. 378, 385 (Bankr. E.D. Pa. 1997), *rev'd*, 228 B.R. 106 (E.D. Pa. 1998); *In re* Wilcox, 209 B.R. 181, 183 (Bankr. E.D.N.Y. 1996); *In re* Hutcherson, 186 B.R. 546, 550 (Bankr. N.D. Ga. 1995); *In re* Lumpkin, 144 B.R. 240, 242 (Bankr. D. Conn. 1992). The mortgagee in each case was barred by 12 U.S.C. § 1701j-3(d)(5) or 12 U.S.C. § 1701j-3(d)(6) from accelerating the mortgage debt based on the transfer because the transfer was to a relative resulting from the death of the mortgagor or was to the mortgagor's child. *See In re Lippolis*, 216 B.R. at 379; *In re Wilcox*, 209 B.R. at 182; *In re Hutcherson*, 186 B.R. at 547; *In re Lumpkin*, 144 B.R. at 241.

334. *In re Threats*, 159 B.R. at 243; *see also In re* Tewell, 355 B.R. 674, 674 (Bankr. N.D. Ill. 2006).

be protected from modification by section 1322(b)(2).[335] When the due-on-sale clause cannot be enforced due to the operation of the Garn-St Germain Act, no modification of the creditor's rights would occur because the creditor has no right to prevent the transfer.[336] Whether through reliance on *Johnson* or recognition of the rights of successor homeowners, bankruptcy courts have generally allowed inclusion of the mortgage debt in a Chapter 13 plan for successors who obtained ownership of the home through an exempt transfer under the Garn-St Germain Act.[337]

While the legal structure of bankruptcy affords successor homeowners an opportunity to cure a default without undertaking the legal risk of a formal assumption, the basic analysis is the same as discussed above: homeowners protected from the exercise of due-on-sale clauses under the Garn-St Germain Act are entitled to exercise all the rights of the original borrower under the mortgage.[338] In one bankruptcy case, the court went so far as to declare that a successor in interest, who had received the home by a Garn-exempt transfer from her mother before her death, had the right to apply for loss mitigation, such as a loan modification.[339] The mortgage creditor strenuously objected based on the lack of contractual privity between it and the borrower's daughter.[340] The court pointed out that there was no default under the due-on-sale clause because this was an exempt transfer under the Garn-St Germain Act, and thus "[t]he consent of the

335. French v. BMO Harris Bank, No. 12 C 1896, 2012 WL 1533310, at *3 (N.D. Ill. Apr. 30, 2012).

336. *Id.*; *In re* Alexander, No. 06-30497-LMK, 2007 WL 2296741 (Bankr. N.D. Fla. Apr. 25, 2007); *In re Lumpkin*, 144 B.R. at 240. Further, where section 1322(b)(2)'s anti-modification language does not apply, such as when a mortgage has matured prior to the final plan payment per 1322(c)(2), a plan can be confirmed despite the violation of a due-on-sale clause. *In re* Evans, No. 11-80123, 2011 WL 1420887 (Bankr. M.D.N.C. Apr. 11, 2011) (allowing heir to pay off accelerated reverse mortgage balance in Chapter 13 plan).

337. *See In re* Cady, 440 B.R. 16, 16 (Bankr. N.D.N.Y. 2010); *In re* Curinton, 300 B.R. 78, 79 (Bankr. M.D. Fla. 2003); *In re* Trapp, 260 B.R. 267, 267 (Bankr. D.S.C. 2001); *In re* Garcia, 276 B.R. 627, 627 (Bankr. D. Ariz. 2000); *In re* Rutledge, 208 B.R. 624, 624 (Bankr. E.D.N.Y. 1997); *In re* Alston, 206 B.R. 297, 297 (Bankr. E.D.N.Y. 1997); *In re* Jordan, 199 B.R. 68, 68 (Bankr. S.D. Fla. 1996); *In re Lumpkin*, 144 B.R. at 240; *cf. In re* Kizelnick, 190 B.R. 171, 173–74 (Bankr. S.D.N.Y. 1995) (holding that the debtor had no standing to address a mortgage in a Chapter 13 plan where she was merely a tenant, not an owner, of the home).

338. Brush v. Wells Fargo Bank, N.A., 911 F. Supp. 2d 445, 460 (S.D. Tex. 2013).

339. *In re* Smith, 469 B.R. 198, 198 (Bankr. S.D.N.Y. 2012).

340. *Id*. at 200.

Creditor was not required for the transfer . . . ."[341] Because the debtor owned the home and the due-on-sale clause was not enforceable, the debtor had the right to treat the mortgage as a claim in her bankruptcy case and also to participate in the court's loss mitigation program.[342]

Bankruptcy courts have acknowledged the fact that the owner of a property has certain rights with regard to the mortgage secured by the home she owns. Although mortgage creditors argue that they have the right to select their "dance partner," or the right not to be "saddled" with a borrower whom they have not selected,[343] those arguments ring hollow in the event of a transfer protected by the Garn-St Germain Act. It is only the due-on-sale clause that allows a creditor to refuse to dance with a new partner, and this restriction is void in a Garn-exempt transfer.[344] Thus, in a transfer to a child or spouse by devise, descent, or decree of dissolution of marriage or legal separation agreement, bankruptcy courts have recognized the successor owner's right to step into the debtor-creditor relationship.[345]

Bankruptcy courts have addressed the issue of successor homeowners more than other courts because of the fast pace of bankruptcy litigation and the broad avenue afforded by the Bankruptcy Code to deal with any claim secured by the debtor's property.[346] These courts reason that the due-on-sale clause in the mortgage is the only thing that gives a creditor the right to limit a successor's rights.[347] Where Congress has barred the exercise of such a clause, there is no barrier to the common law right to assume. Some of the legal theories about the nature of a claim and whether the creditors' rights are impermissibly modified are unique to bankruptcy.[348] The underlying analysis—that transfers protected from the exercise of a due-on-sale clause permit a successor homeowner to step into the shoes of the original borrower

341. *Id.* at 198, 202; *see also In re Jordan*, 199 B.R. at 70 (holding that the son of original borrower did not need creditor's approval to assume the loan, even though the loan documents specified that assumption would only be allowed with the approval of the Secretary of Veterans Affairs and finding the restrictive assumption clause was equivalent to a due-on-sale clause and unenforceable under the Garn-St Germain Act).

342. *In re Smith*, 469 B.R. at 203.

343. *In re* Allen, 300 B.R. 105, 115 (Bankr. D.D.C. 2003).

344. *See generally supra* Part IV.C (discussing the relationship between the Garn-St Germain Act and due-on-sale clauses).

345. *See supra* note 341 and accompanying text.

346. *See* John D. Ayer et al., *Chapter 11–"101"*, 23-FEB AM. BANKR. INST. J. 16, 16 (2004).

347. *See supra* Part IV.C.

348. Ayer et al., *supra* note 346, at 16.

regardless of default—holds true outside of bankruptcy.

VII. REVERSE MORTGAGES POSE SPECIAL CHALLENGES

Our discussion to this point has focused on traditional, "forward" mortgages. Under a traditional mortgage, the borrower receives a lump sum of cash up front and is obligated to make repayment over time.[349] The terms of that repayment vary, but a basic presumption is that the loan will be repaid from the borrower's income, not from the borrower's assets.[350] During the 1980s, legislative concern arose regarding traditional mortgages and whether they served the needs of older homeowners.[351] In 1988, Congress authorized the Department of Housing and Urban Development (HUD) to "carry out a program of mortgage insurance" designed "to meet the special needs of older homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing, and subsistence needs at a time of reduced income."[352] While private reverse mortgages do exist, the bulk of all reverse mortgage lending is insured by the federal government and regulated under the aegis of HUD.[353] Our discussion will consequently focus on these HUD-insured reverse mortgages, sometimes called Home Equity Conversion Mortgages (HECMs).

Reverse mortgages address the paradox facing many older homeowners who have accumulated equity in their homes over the years.[354] Older homeowners may be house-rich, but cash-poor, with limited income.[355] As a result, although they have significant assets, they may face trouble with daily

349. Olivia Lapeyrolerie, *#Housing101: What Is a Mortgage?*, U.S. DEP'T HOUSING & URB. DEV. (July 15, 2013), http://blog.hud.gov/index.php/2013/07/15/so-what-exactly-is-a-mortgage/.

350. Lending on the basis of the collateral rather than the borrower's ability to pay is generally considered a predatory practice. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, ADVISORY LETTER NO. AL 2003-3: AVOIDING PREDATORY AND ABUSIVE LENDING PRACTICES IN BROKERED AND PURCHASED LOANS (2003), http://www.occ.gov/static/news-issuances/memos-advisory-letters/2003/advisory-letter-2003-3.pdf.

351. *See, e.g.*, *Hearing Before the Spec. Comm. on Aging*, 97th Cong. 1 (1982).

352. 12 U.S.C. § 1715z-20(a) (2012); *see also* Tara Twomey, *Crossing Paths: The Intersection of Reverse Mortgages and Bankruptcy*, 89 AM. BANKR. L.J. 363, 369 (2015).

353. *Reverse Mortgages: Avoiding a Reversal of Fortune*, FINRA, http://www.finra.org/investors/protectyourself/investoralerts/retirementaccounts/p038113 (last updated May 1, 2014).

354. Celeste M. Hammond, *Reverse Mortgages: A Financial Planning Device for the Elderly*, 1 ELDER L.J. 75, 75–76 (1993).

355. *Id*.

living expenses or home maintenance, including property taxes.[356] Reverse mortgages allow an older homeowner to tap into the equity in his or her home with no expectation of repayment until the homeowner dies, transfers title to the home, or moves out of the home.[357] At that time, the loan, with interest, comes due in a lump sum.[358] If the balance due on the loan, including interest and fees, exceeds the value of the home, neither the borrower nor the borrower's heirs are liable for the deficiency.[359] Instead, for federally-insured loans, HUD makes up the difference.[360] Because there are no intervening payment obligations until the loan comes due, there is no general right under reverse mortgages to reinstate upon default for nonpayment or modify the mortgage obligation.[361] Borrowers under reverse mortgages must still maintain the home in good condition and pay property taxes, homeowner's insurance, and association dues.[362] But a breach of those covenants may usually be cured.[363]

The Office of the Comptroller of the Currency's (OCC) regulations implementing the Garn-St Germain Act explicitly exempt reverse mortgage loans from the prohibition on the exercise of due-on-sale clauses.[364] This makes sense given the special nature of reverse mortgages and the risks they pose to lenders. Underwriting a reverse mortgage is based largely on the relationship between the life expectancy of the borrower (how long until the loan will be repaid?) and the value of the property (how much equity is there in the property from which to repay the loan?).[365] Many reverse mortgages are structured so that the loan proceeds are paid out as an annuity with

356. *See id.*

357. 24 C.F.R. § 206.27(c) (2015); *see generally* ANDREW G. PIZOR ET AL., NAT'L CONSUMER LAW CTR., MORTGAGE LENDING § 9.3 (2d ed. 2014); RAO ET AL., *supra* note 96, § 16.1 ("Generally, reverse mortgages become due and payable when the borrower dies, sells the home, or permanently relocates from the home.").

358. 24 C.F.R. § 206.27(c).

359. 12 U.S.C. § 1715z-20(d)(7) (2012).

360. CONSUMER FIN. PROT. BUREAU, REVERSE MORTGAGES: REPORT TO CONGRESS § 2.2 (June 28, 2012).

361. JAY E. GRENIG, 18 WISCONSIN PRACTICE, ELDER LAW § 12:39, Westlaw (database updated Sept. 2015).

362. 24 C.F.R. § 206.27(b)(6).

363. *Id.*

364. 12 C.F.R. § 191.5(b)(1) (2015).

365. RAO ET AL., *supra* note 96, § 16.2.

regular payments made to the borrower over time.[366] The actuarial assumptions are intended to result in the loan coming due and payable before the loan amount exceeds the value of the home.[367] Allowing children to assume their parents' reverse mortgages could extend indefinitely the lender's obligation to make annuity payments, consuming the entire value of the home and then some. Nonetheless, both surviving spouses, and heirs generally, have important rights and protections.[368] In this Part, we will discuss the protections specifically available to these surviving spouses.

The central problem faced by non-borrowing spouses of reverse mortgage borrowers is whether they may remain in the house after the death of the borrower.[369] As discussed above, the death of the borrower causes a reverse mortgage to come due and payable,[370] and the Garn-St Germain protections ordinarily available to surviving spouses are unavailing.[371] Because available loan proceeds, including the amount available to loan originators, increase with the borrower's age,[372] loan originators have some incentive to originate the reverse mortgage with only the older spouse as the borrower.[373] This has resulted in some loan officers and brokers encouraging younger spouses to give up their interest in the marital home[374] so that the loan can be originated without the younger spouse as a co-borrower.[375] This puts the younger spouse at risk of foreclosure and

366. John L. O'Brien III, Note & Comment, *Reverse Annuity Mortgages and the Lien Priority Problem*, 8 ANN. REV. BANKING L. 687, 687–88 (1989).

367. RAO ET AL., *supra* note 96, § 16.2.

368. *See generally* PIZOR ET AL., *supra* note 357, § 9.7.2 (explaining concerns with fraud, misrepresentation, and other unfair practices that the original borrower and surviving spouse may encounter); RAO ET AL., *supra* note 96, § 16.3.3.3.

369. Rene L. Robertson, Note, *"But It's My House Too": HUD's Failure to Include Statutorily Required Protections for Non-Borrowing Spouses in Reverse Mortgage Regulations*, 27 QUINNIPIAC PROB. L.J. 94, 94–95 (2013).

370. *Id*.

371. *See* Grant S. Nelson & Dale A. Whitman, *Congressional Preemption of Mortgage Due-on-Sale Law: An Analysis of the Garn-St Germain Act*, 35 HASTINGS L.J. 241, 254 (1983).

372. RAO ET AL., *supra* note 96, § 16.2.

373. *Id.*

374. *See* Plaintiffs' Motion for Preliminary Injunction, Plunkett v. Donovan, No. 1:14-cv-326 (D.D.C. Feb. 27, 2014) [hereinafter Plunkett Preliminary Injunction]; CONSUMER FIN. PROT. BUREAU, *supra* note 360, § 6.7.

375. Every person on title at the time the loan closes must be a borrower on the reverse mortgage loan. 24 C.F.R. § 206.35 (2015).

displacement upon the death of the older spouse.[376] Even if the younger spouse is later added back to the deed to the property, HUD regulations have required the mortgage to be repaid when the borrowing spouse dies.[377]

Congress intended to protect spouses from being dispossessed in this way.[378] The statute authorizing HUD's reverse mortgage program, in a subsection titled "Safeguard to prevent displacement of homeowner," states:

> The Secretary may not insure a home equity conversion mortgage under this section unless such mortgage provides that the homeowner's obligation to satisfy the loan obligation is deferred until the homeowner's death, the sale of the home, or the occurrence of other events specified in regulations of the Secretary. For purposes of this subsection, the term "homeowner" includes the spouse of a homeowner.[379]

Unfortunately, HUD's regulations, and the form mortgage contracts it requires lenders to use, have violated the statute by providing that the mortgage become due and payable upon the death of the last mortgagor, not the homeowner or spouse of the homeowner.[380]

In response to litigation,[381] HUD has changed its regulations so that for any new reverse mortgages originated after August 4, 2014, the loan amount will be calculated based on the age of the youngest borrower or spouse and the non-borrowing spouse will be allowed to remain in the home until his death.[382] And finally, on June 12, 2015, HUD issued a mortgagee letter

376. Robertson, *supra* note 369, at 98.

377. *See id.*

378. Nelson & Whitman, *supra* note 371, at 270.

379. 12 U.S.C. § 1715z-20(j) (2012).

380. Robertson, *supra* note 369, at 110–11.

381. *See* Bennett v. Donovan, 703 F.3d 582, 589–90 (D.C. Cir. 2013) (holding that several surviving spouses of reverse mortgage borrowers seeking to protect the right of possession for surviving non-borrowing spouses had standing to pursue their claims against HUD); Bennett v. Donovan, 4 F. Supp. 3d 5, 16 (D.D.C. 2013) (holding that HUD's regulation allowing for foreclosure where a surviving spouse still lived in the home was invalid as applied to these surviving spouses because it violated the unambiguous language of the statute); Plunkett Preliminary Injunction, *supra* note 374 (raising the same claims as *Bennett* on behalf of a class of surviving spouses).

382. *Mortgagee Letter 2014-07*, U.S. DEP'T HOUSING & URB. DEV. 1, 11 (Apr. 25, 2014), http://portal.hud.gov/hudportal/documents/huddoc?id=14-07ml.pdf.

addressing this problem for loans originating prior to August 4, 2014.[383] HUD's new policy allows lenders to assign any reverse mortgage where an eligible non-borrower spouse still lives in the home to HUD, who will refrain from foreclosing while the spouse continues to reside in the home, provided that certain criteria and deadlines are met.[384] The new policy will still fail to protect many surviving spouses because of the overly restrictive requirements to establish legal title or a right to stay in the home within 90 days and immediately cure any default on property taxes or homeowner's insurance and HUD's failure to require its servicers to affirmatively contact impacted spouses.[385]

Other heirs are not protected by statute to the same extent as surviving spouses, but they are still entitled to information about the mortgage loan necessary to enable them to decide whether to sell, refinance, or turn the home over to the lender. Questions sometimes arise regarding the amount necessary to retire the reverse mortgage loan. HUD regulations provide that the mortgagor may sell the home for the appraised value of the home, even if the balance owed exceeds that value.[386] If the mortgage has been declared due and payable based on a triggering event, the mortgagor may sell the home for 95% of the appraised value of the home.[387] For purposes of the sale of the property described above, "mortgagor" includes "the mortgagor's estate or personal representative."[388]

Despite this language in the regulation, HUD issued a mortgagee letter in 2008 stating that lenders could only accept less than the full balance owed on the loan if the sale of the property was an arms-length transaction.[389]

383. *Mortgagee Letter 2015-15*, U.S. DEP'T HOUSING & URB. DEV. 1 (June 12, 2015), http://portal.hud.gov/hudportal/documents/huddoc?id=15-15ml.pdf.

384. *Id.* at 1–2.

385. *See* Marcie Geffner, *How to Keep the Home After the Death of a Spouse Who Got a Reverse Mortgage*, BANKRATE.COM (Jan. 22, 2016), http://www.bankrate.com/finance/mortgages/reverse-mortgage-surviving-spouse-keep-home.aspx; *Priorities for Consumers with HECM Reverse Mortgages*, NAT'L CONSUMER L. CTR. (Sept. 2015), https://www.nclc.org/images/pdf/foreclosure_mortgage/reverse-mortgages/HECM-changes92515.pdf; *Advocates Applaud HUD on New Reverse Mortgage Policy that Could Reduce Foreclosures on Surviving Spouses*, NAT'L CONSUMER L. CTR. (June 17, 2015), http://www.nclc.org/media-center/applaud-hud-new-reverse-mortgage-policy.html.

386. 24 C.F.R. § 206.125(c) (2015).

387. *Id*.

388. *Id*. § 206.123(b).

389. *Mortgagee Letter 2008-38*, U.S. DEP'T HOUSING & URB. DEV. (Dec. 5, 2008), https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_20411.doc.

HUD has since rescinded that mortgagee letter[390] and recently issued a mortgagee letter clarifying that heirs may retire the loan by paying 95% of the current appraised value of the house.[391]

While reverse mortgages are legitimately treated differently from other mortgages for purposes of the rights of heirs to assume, successor homeowners are still entitled to full access to information, and surviving spouses are additionally entitled to protections against displacement.[392] In the following Part we discuss other policy recommendations for improved protection of successor homeowners.

VIII. POLICY RECOMMENDATIONS

As shown above, a successor homeowner after death or divorce has the right to assume the mortgage loan and apply for loss mitigation. However, servicers too often misunderstand the applicable law and misinform the homeowner, stating that she cannot apply for a loan modification because she is not the borrower and is "not eligible" to assume the loan.[393] In light of this problem, regulatory agencies and GSEs[394] have gradually attempted to clarify that a successor homeowner should be evaluated for loss mitigation and allowed to pursue a simultaneous modification and assumption.[395] Currently, a patchwork of servicing rules and regulations addresses this issue, with different rules applying depending upon who insures, owns, and services the mortgage.

If a mortgage is FHA-insured, FHA servicing rules promulgated by HUD apply.[396] If a mortgage is instead owned by Fannie Mae or Freddie

390. RAO ET AL., *supra* note 96, § 16.2; *Mortgagee Letter 2011-16*, U.S. DEP'T HOUSING & URB. DEV. (Apr. 5, 2011), http://portal.hud.gov/hudportal/documents/huddoc?id=11-16ml.pdf.

391. *Mortgagee Letter 2015-10*, U.S. DEP'T HOUSING & URB. DEV. (Apr. 23, 2015), http://portal.hud.gov/hudportal/documents/huddoc?id=15-10ml.pdf.

392. *See* Rachel L. Sheedy, *What Heirs Need to Know About Reverse Mortgages*, KIPLINGER'S RETIREMENT REP. (Mar. 2014), http://kiplinger.com/article/retirement/T021-C000-S004-what-heirs-need-to-know-about-reverse-mortgages.html.

393. *See supra* Part IV.

394. The Government Sponsored Enterprises (GSEs) are Fannie Mae and Freddie Mac. *See supra* note 49 and accompanying text.

395. Muse-Evans, *supra* note 49.

396. *See Mortgagee Letter 2009-42*, U.S. DEP'T HOUSING & URB. DEV. 1 (Oct. 19, 2009), http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/files/09-42ml.doc.

Mac, those respective rules apply.[397] Additionally, if a mortgage is not FHA-insured or owned by a GSE, any servicer participating in the Treasury Department's Making Home Affordable program is required to comply with the MHA Handbook until that program sunsets.[398] Finally, the CFPB's relevant mortgage servicing regulations and guidance apply to most closed-end mortgages secured by the borrower's principal residence, regardless of who insures or owns the loan.[399]

In November 2014, the CFPB issued proposed regulations under RESPA that would give expanded rights to successors in interest.[400] The CFPB's proposed regulation provides that once a servicer confirms a successor in interest's identity and ownership interest in a property that secures a covered mortgage loan, the successor shall be considered a borrower for purposes of RESPA's mortgage servicing rules.[401] The proposed rule defines successor in interest as a person who acquires an ownership interest in the home from a borrower through a transfer that is exempt from exercise of a due-on-sale clause under the Garn-St Germain Act.[402] The proposed regulation creates a limited request for information for a potential successor in interest to obtain from a servicer a list of any documentation needed to establish successor status.[403] The proposal also requires servicers to implement policies and procedures reasonably designed to communicate with potential successors in interest regarding how to confirm successor status.[404]

Although this proposed rule represents a significant step forward in protecting successors from the risk of foreclosure, the rule must be strengthened in order to have the desired effect. Even if the CFPB adopts its

397. *See* RAO ET AL., *supra* note 96, § 16.3.1.

398. *See* MHA HANDBOOK, *supra* note 99, § 7. Unless extended, the Home Affordable Modification Program (HAMP) is scheduled to expire on December 31, 2016. *See Making Home Affordable*, U.S. DEP'T TREASURY, http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/default.aspx (last updated Mar. 6, 2015).

399. Exceptions apply for small servicers, servicers of reverse mortgages, and qualified lenders as defined under 12 C.F.R. § 617.7000.

400. *See* Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement and Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 74,176, 74,177 (Dec. 15, 2014).

401. *Id*.

402. *Id*. at 74,181.

403. *Id*.

404. *Id*. at 74,182.

proposed rule, key gaps will remain.

The agencies' approach to clarifying the right of successor homeowners to assume the loan and apply for a modification has been far from uniform or comprehensive. Gaps and inconsistencies abound. And in too many cases, even where regulations mandate that a successor homeowner be considered for a loan modification, successors are still experiencing unnecessary roadblocks and wrongful denials.[405] The agencies should expand and coordinate their regulations and guidance to close the gaps, align rules, and ensure that successors in interest have access to information and the loss mitigation process. Below, we outline the primary issues that remain for clarification and improvement in agency policies and the CFPB rules, including the need for private enforceability at every step of the process.

It is essential that any expanded rules apply to the broad range of successors in interest. These include a surviving spouse or partner, regardless of whether the interest in the home passed through a joint tenancy with right of survivorship deed[406] or through devise or descent; a child of the borrower who has title to the home; any heir who inherits the home in connection with the borrower's death; and a divorced spouse with title to the property, regardless of whether she obtained it through a divorce decree or a quitclaim deed. Additional protections are needed for successor homeowners who are survivors of domestic violence.

A. The CFPB Should Promulgate Privately Enforceable Regulations that Require Servicers to Communicate with and Provide Information to the Successor Homeowner and to Accept Reasonable Documentation of Successor Status

It is critical for a successor homeowner to be able to communicate with the servicer regarding the mortgage loan in order to make payments, find out if the loan is in default, and apply for an assumption and loan modification, if necessary. Servicers should be required to provide all the information a

405. *See infra* Part VIII.A–.G.

406. Where grantees of a deed are described as joint tenants with right of survivorship, the death of one joint tenant results in that joint tenant's interest in the property passing automatically to the remaining joint tenant(s) outside of the decedent's estate. *See* United States v. Craft, 535 U.S. 274, 280 (2002); Megan D. Randolph, *Let No Man Put Asunder: Divorce, Joint Tenancy, and Notices of Severance*, 47 U. LOUISVILLE L. REV. 607, 613 (2009).

successor homeowner needs to make a prudent decision on whether or not to assume the mortgage. As we explained in Part II, federal privacy regulations under the GLBA do not restrict servicers from sharing this information with successors.[407]

The CFPB's existing regulations under RESPA require servicers to implement policies that allow them to "[u]pon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower."[408] This requirement obviously omits other types of successors, including those obtaining the home through divorce or another intra-family transfer. Moreover, it is neither privately enforceable nor detailed enough to elicit compliance.

Servicers often impose burdensome and unnecessary documentation requirements on successor homeowners to prove their interest in the home. The CFPB has received reports of servicers demanding documents to prove a successor's interest in the property that "are not reasonably available" or "do not exist," including probate documents where there was no property to probate because the home passed directly to a joint tenant by a survivorship deed.[409] Yet the CFPB's regulation at 12 C.F.R. § 1024.38(b)(vi) generally requires servicers to promptly identify and facilitate communication with successors in interest.

The CFPB's proposed amendment of 12 C.F.R. § 1024.38 requires servicers to communicate with any potential successor in interest, not just those related to the death of a borrower.[410] The CFPB has proposed expanded commentary on section 1024.38, which explains what kind of documentation would be reasonable for a servicer to require to prove a successor's ownership interest.[411] This commentary expands on the information contained in CFPB Bulletin 2013-12. However, all of these changes continue to be located in an unenforceable section of RESPA.

The CFPB should move its existing rule (and the proposed additions) on communication with successor homeowners to a privately enforceable

407. 46 AM. JUR. 2D, *supra* note 137, § 1021.

408. 12 C.F.R. § 1024.38(b)(vi) (2015).

409. *CFPB Bulletin 2013-12*, *supra* note 9. For an explanation of a right of survivorship deed, see *supra* note 352.

410. *See* Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement and Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 74,176 (Dec. 15, 2014).

411. *See id*.

section of the RESPA regulations, like it has for most of its other servicing regulations, and incorporate its existing guidance into the new, privately enforceable regulatory provisions.[412] Private enforceability of such rules will enhance compliance.[413]

The cost of non-compliance with the protections for successors in interest is often loss of the family home.[414] Even with existing requirements imposed by Fannie Mae, Freddie Mac, HUD, and the Treasury's MHA Handbook, servicer noncompliance with procedures designed to help successors save their homes is widespread.[415] While government enforcement is important, only private enforcement is likely to provide solutions in real time to individuals who are facing non-compliant servicers and trying to save their homes.[416] Moreover, these unnecessary foreclosures increase losses for investors and exacerbate the effects of foreclosures in communities.[417]

In addition, the CFPB should bring enforcement actions against servicers who are not complying with its existing rules. Currently, the CFPB regulation requires servicers to communicate with a joint tenant who is not required to go through probate after the borrower's death, yet homeowners around the country commonly face requests from servicers to file for probate—even where the interest in the property has already passed to the surviving spouse by a right of survivorship deed and there is no estate to probate.[418] The CFPB should hold servicers accountable for this conduct.

412. Congress also would enhance protections for successors in interest if it amended the Garn-St Germain Act to provide a private cause of action under that statute.

413. *See, e.g.*, DeJesus v. Banco Popular de P.R., 918 F.2d 232 (1st Cir. 1990); Williams v. Pub. Fin. Corp., 598 F.2d 349, 359–60 (5th Cir. 1979) ("The private attorney general who exposes and opposes these credit wolves is not deemed unduly enriched when his valor is richly rewarded and his vendor harshly rebuked."); Buford v. Am. Fin. Co., 333 F. Supp. 1243, 1248 (N.D. Ga. 1971) (The Truth in Lending Act "clearly contemplates substantial enforcement through individual consumers acting as 'private attorneys-general.'").

414. *See Snapshot*, *supra* note 24.

415. *Id*.

416. *Id*.

417. G. Thomas Kingsley et al., *The Impacts of Foreclosures on Families and Communities*, URB. INST. (May 2009), http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.PDF.

418. *See* Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement and Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 74,176, 74, 291–92 (Dec. 15, 2014).

B. The CFPB and Other Agencies Should Prohibit Servicers from Initiating, Continuing, or Completing a Foreclosure Sale While a Successor Is Being Reviewed for Loan Modification and Assumption

Fannie Mae, Freddie Mac, HUD, and the MHA Handbook all require servicers to stop the foreclosure process in certain circumstances where the borrower has submitted a complete loss mitigation application.[419] The CFPB's RESPA rule also imposes restrictions on "dual tracking" of foreclosure and loss mitigation.[420]

The GSEs, HUD, the Treasury Department, and the CFPB should clarify their current restrictions on foreclosures during loan modification reviews to make it clear that these protections apply to successor homeowners who are in the process of applying for a loan modification and assumption.[421] The CFPB's proposed RESPA rule does not extend dual-tracking protections to successors until they have gotten the servicer to confirm their status as a successor, which could involve months of delay and frustration while foreclosure looms large.[422] More generally, closing the loopholes in the current dual-tracking restrictions would benefit successor homeowners, as well as other homeowners seeking loss mitigation after foreclosure has been initiated.[423]

C. The OCC, HUD, Treasury Department, and GSEs Should Clarify That a Successor Need Not "Qualify" to Assume the Loan nor Demonstrate That the Loan Is Current at the Time of Assumption

Under the Garn-St Germain Act, creditors may not exercise the due-on-sale clause in a mortgage based on certain exempt transfers, including a transfer by death, descent, or operation of law upon the death of a joint tenant; a transfer to a relative resulting from the death of a borrower; a transfer where a spouse or children of the borrower become the owner of the

419. CONSUMER FIN. PROT. BUREAU, MORTGAGE SERVICING RULES UNDER THE REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X) 9–12 (Jan. 17, 2013), http://files.consumerfinance.gov/f/201301_cfpb_final-rule_servicing-respa.pdf.

420. *Id*.

421. *Comments to the Consumer Financial Protection Bureau Regarding 12 C.F.R. Parts 1024 & 1026*, NAT'L CONSUMER L. CTR. (Mar. 16, 2015) [hereinafter *Comments Re: 1024 & 1026*], http:www.nclc.org/images/pdf/rulemaking/comments-servicing-cfpb-march16-15.pdf.

422. *Id*.

423. *Id.*

property; or a transfer resulting from a divorce decree, legal separation agreement, or incidental property settlement.[424] Therefore, a successor owner through such an exempt transfer has the right to assume the mortgage loan, and a servicer should not be permitted to impose any creditworthiness review or other condition on an assumption, such as a requirement that the loan is current.

The OCC should clarify in the regulations implementing the Garn-St Germain Act that servicers must recognize the assumption of the mortgage by a family member, regardless of default status and without additional credit screening. Implicitly, by prohibiting the servicer from exercising the due-on-sale clause, the Garn-St Germain Act requires servicers to recognize the assumption of the mortgage by these successors.[425] The Fannie Mae Single Family Servicing Guide recognizes this reality: "[T]he servicer must process [these] exempt transactions without reviewing or approving the terms of the transfer."[426] Further, where a successor has acquired her interest in the home prior to, and independent of, any agreement to assume liability for the debt, the TILA ability-to-repay rules do not apply to the assumption.[427] But the lack of regulations clearly stating that a successor has the right to assume the loan and apply for a loan modification after a Garn-exempt transfer has created confusion regarding successors' rights.[428]

The GSEs, Treasury Department, and HUD should all expressly prohibit servicers from requiring a successor homeowner to qualify for an assumption. As discussed below, a successor homeowner should not be required to assume the note until the servicer provides information regarding the status of the loan and reviews any request from the successor for loss mitigation.[429]

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424. 12 U.S.C. § 1701j-3 (2012).

425. *Comments Re: 1024 & 1026*, *supra* note 421.

426. FANNIE MAE GUIDE, *supra* note 209, § D1-4.1-02.

427. *Application of Regulation Z's Ability-to-Repay Rule to Certain Situations Involving Successors-in-Interest*, CONSUMER FIN. PROTECTION BUREAU (July 11, 2014) [hereinafter *Regulation Z Interpretive Rule*], http://files.consumerfinance.gov/f/201407_cfpb_bulletin_mortgage-lending-rules_successors.pdf. The CFPB should formalize this interpretative rule to enhance compliance.

428. *Comments Re: 1024 & 1026*, *supra* note 421.

429. *CFPB Bulletin 2013-12*, *supra* note 9; *see infra* Part VIII.D.

D. The CFPB and Other Agencies Should Require Servicers to Evaluate Successor Homeowners for a Loan Modification Before Requiring Assumption of the Loan

The need to assume the mortgage in order to achieve a loan modification puts the homeowner in a Catch-22. Without the assumption, the servicer may not allow the homeowner to get a loan modification that makes the loan affordable, but without a loan modification, a homeowner risks incurring personal liability on a debt she cannot afford.[430]

Fannie Mae and Freddie Mac both require servicers to evaluate successor homeowners for a loan modification before requiring them to assume personal liability on the debt.[431] The Treasury Department and HUD also direct servicers to evaluate a simultaneous assumption and modification for successor homeowners applying for HAMP and FHA modifications.[432] Still, there is no market-wide requirement that servicers evaluate a modification prior to the successor's assumption of liability.[433] The CFPB's proposed amendment to RESPA regulations would prohibit servicers from conditioning review for a loan modification on a successor's prior assumption of the loan.[434] This is an important protection and the CFPB should maintain this element in the final rule. Market-wide guidance on this issue could only come from the CFPB or the OCC as the agency that implements the Garn-St Germain Act.[435] Both the OCC and the CFPB should require servicers to evaluate successor homeowners for a loan modification prior to assumption. Such a requirement would allow homeowners to make an informed decision about the risks and benefits of assuming the loan. Requiring homeowners to assume the loan before evaluation for a loan modification forces homeowners to take a gamble in

430. Harwell, *supra* note 67.

431. Muse-Evans, *supra* note 49, at 1 (explaining that successor homeowner must be evaluated for loan modification as if she were the original borrower and the packet should be forwarded to Fannie Mae for review of modification and "related assumption"); *see also* FREDDIE MAC GUIDE, *supra* note 239, at ch. 65.12(b).

432. MHA HANDBOOK, *supra* note 99, at 129; *FHA Single Family Housing Policy Handbook*, U.S. DEP'T HOUSING & URB. DEV. 543 [hereinafter *FHA Handbook*], http://portal.hud.gov/hudportal/documents/huddoc?id=40001HSGH.pdf (last updated Sept. 30, 2015).

433. While *CFPB Bulletin 2013-12, supra* note 9, addresses communication issues, it does not address assumption, nor is it privately enforceable, as discussed above.

434. *See id.*

435. *Id*.

the dark and provides no benefit to lenders.

E. The CFPB, the GSEs, HUD, and the Treasury Department Should Ensure that All Successor Homeowners Can Apply for Loss Mitigation

Fannie Mae, Freddie Mac, HUD, and the Treasury Department (in its MHA Handbook) have all spoken to clarify that successor homeowners pursuant to the death of a borrower should be able to apply for a loan modification.[436] However, after a transfer of ownership related to divorce or family breakup, the options for a remaining non-borrower homeowner are less uniform.[437] Fannie Mae's requirements are the clearest: after any "exempt transaction," which includes all Garn-exempt transfers and some additional kinds of transfers, the servicer must evaluate the successor owner for all available workout options.[438] Thus, Fannie Mae rules protect any transfer of property to the borrower's spouse under a divorce decree, legal separation agreement, or incidental property settlement agreement.[439] Freddie Mac's position is less clear. In one section of its Servicing Guide, Freddie Mac takes the same position as Fannie Mae–servicers may not enforce a due-on-sale clause based on any Garn-exempt transfer.[440] However, in its specific discussion of simultaneous loan modification and assumption, Freddie Mac suggests that a non-borrower may be evaluated for this option only "where all Borrowers are deceased."[441] HUD has recently clarified its servicing policy that any non-borrower who becomes the owner of a home pursuant to a Garn-exempt transfer, including through a divorce, should be evaluated for the usual array of home retention options.[442] The MHA Handbook allows for assumption and modification after death or divorce, but suggests that investor restrictions may apply.[443] The CFPB, Treasury Department, HUD, and the GSEs should clarify that all successors protected by the Garn-St Germain Act may apply for all loss mitigation

436. Muse-Evans, *supra* note 49; MHA HANDBOOK, *supra* note 99.

437. FREDDIE MAC GUIDE, *supra* note 239.

438. Muse-Evans, *supra* note 49. For a list of exempt transactions, see FANNIE MAE GUIDE, *supra* note 209, § D1-4.1-02.

439. FANNIE MAE GUIDE, *supra* note 209, § D1-4.1-02.

440. FREDDIE MAC GUIDE, *supra* note 239, at ch. B65.12, B65.28.

441. *Id.*

442. *FHA Handbook*, *supra* note 432, at 587.

443. MHA HANDBOOK, *supra* note 99, at 129.

options.

Beyond situations of death and divorce, successors must be able to obtain loss mitigation where a divorce or separation agreement is not yet final or where there is another type of family dissolution, such as a separation due to domestic violence. These successors may face hurdles even where they are already co-borrowers on the loans. Servicers generally require all original borrowers to sign any loss mitigation application and loan modification documents unless there has been a final divorce decree or legal separation agreement.[444] Even Fannie Mae and the MHA Handbook require proof of income and signature on modification documents by all original borrowers on the loan, unless a divorce decree or legal separation agreement can be provided.[445] Fannie Mae does state that servicers have discretion not to require the signature of a co-borrower in situations of contested divorce,[446] but this guidance is too narrow. Freddie Mac and HUD's requirements also fail to provide for many situations. HUD's rules, for example, do allow non-borrower homeowners to be considered for loss mitigation, but it must be done with the cooperation and approval of existing borrowers unless the transfer was exempt under Garn-St Germain.[447] These requirements may pose the greatest hardship for survivors of family violence, who for their own safety might not have secured a final divorce decree or legal separation agreement.[448] Servicers should not require co-borrower signatures or income documentation, even without a final divorce decree, where (a) one spouse has moved out of the house and signed a quitclaim deed relinquishing any interest in the house or (b) a divorce or separation agreement is in process and there has been family violence. A non-borrower spouse or domestic partner should be eligible to apply for a simultaneous loan modification and assumption in these situations. Where there has been family violence, a protective order from a court should provide an adequate basis for the servicer to communicate with the non-resident borrower and potentially to provide for modification. That path

444. FANNIE MAE GUIDE, *supra* note 209, § D2-2-05; FREDDIE MAC GUIDE, *supra* note 239, at ch. C65.7.

445. FREDDIE MAC GUIDE, supra note 239, at ch. B65.24(a); MHA HANDBOOK, supra note 99, at 159.

446. FANNIE MAE GUIDE, *supra* note 209, § F-1-18.

447. *FHA Handbook*, *supra* note 432, at 587.

448. *See Home Ownership Issues for Survivors of Domestic Violence*, BATTERED WOMEN'S JUST. PROJECT–CIV. (Sept. 2004), http://www.jwi.org/document.doc?id=133.

may be made easier where a permanent protective order provides permission for the resident homeowner to communicate with the mortgage servicer and where the order allows for modification.

F. The GSEs, Treasury Department, HUD, and the CFPB Should Require Servicers to Evaluate Successor Homeowners for All Loss Mitigation Options

Successor homeowners should be evaluated for all loss mitigation options. Fannie Mae's servicing rules require the servicer to evaluate the new non-borrower owner for *all available* workout options.[449] Freddie Mac, as of June 2014, allows successor homeowners to apply for a simultaneous assumption and modification through either the Standard Modification or HAMP[450] but provides no clear guidance on whether successors may apply for a deed in lieu of foreclosure, short sale, repayment plan, or forbearance.[451] The Treasury Department's MHA Handbook does not clearly provide that successor homeowners may apply for a full array of loss mitigation options, including on second mortgages.[452] The Treasury Department and Freddie Mac should clarify their policies to require servicers to evaluate successor homeowners for all loss mitigation options. Moreover, the CFPB should require that servicers offering loss mitigation must make all options available to successors.

G. HUD Must Provide Information Regarding Its New Policy to Protect Non-Borrower Spouses

HUD should broadly disseminate information regarding its new policy that would allow eligible surviving spouses to remain in their homes after the death of the borrower and require servicers to reach out to impacted borrowers and spouses about the policy. Many non-borrowing spouses have no idea that the new program has been created. If information is not adequately conveyed to these vulnerable homeowners, they may miss the deadlines HUD has imposed for mortgagees to elect to assign the loan to

449. FANNIE MAE GUIDE, *supra* note 209, § D1-4.1-02.

450. FREDDIE MAC GUIDE, *supra* note 239, at ch. B65.28.

451. *See Freddie Mac Bulletin 2014-10*, FREDDIE MAC 1, 6 (June 3, 2014), http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1410.pdf.

452. *See* MHA HANDBOOK, *supra* note 99, at 129.

HUD in lieu of foreclosing. Moreover, HUD should adjust the criteria for this program so that surviving spouses will not be automatically excluded if they need additional time to establish legal title or a right to remain in the home or to cure a default on property taxes or insurance.

IX. CONCLUSION

Commentators express grave concern about the potential financial havoc wreaked by third-party assumptions.[453] Among the parade of horribles are the inability of lenders to rewrite mortgages at increased interest rates, the loss of credit-worthy borrowers, and the potential for fraud and property waste.

Assumptions do allow homeowners to keep in place existing mortgages when they would otherwise have to take out a new mortgage and generate larger profits for lenders.[454] And, in rising interest-rate environments, the credit squeeze that lenders feel between low interest-rate loans and lenders' own high cost of credit is real and can erode their bottom line. But assumptions, by themselves, do not worsen the security position of lenders, nor do they erode the credit quality of borrowers. An assumption does not relieve the original borrower of her obligations, but merely adds a second borrower.[455] Lenders do not lose their right to pursue the original, presumably credit-worthy borrower based upon an assumption. The risk and loss to lenders is primarily an interest-rate risk and the loss of increased business from new purchase money mortgages, rather than losses from capital not being repaid.[456] This interest-rate risk is part of the risk calculus

453. *See, e.g.*, S. REP. NO. 97-536, at 21 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3054, 3075 (warning that if restrictions are placed on due-on-sale clauses, the "traditional mainstay of American homeowners—the long-term fixed rate mortgage"—could disappear); Arthur J. Margulies, *The Cure and Reinstatement of Mortgages by Third Party Assignees*, 24 CARDOZO L. REV. 449, 475 (2002) (expressing concern that bankruptcy decisions permitting cure and reinstatement by a third-party assignee of the mortgage forces creditors to extend credit to those who would never qualify for it on their own, yet failing to discuss the extent to which the lenders pursued the original debtors).

454. *Cf.* Wellenkamp v. Bank of Am., 582 P.2d 970, 976 n.11 (Cal. 1978) (noting that lenders have used due-on-sale clauses to extract large assumption fees from borrowers).

455. *See, e.g.*, W. Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n, 506 So. 2d 241, 246 (Miss. 1986) (finding that the original debtor, guarantors, and grantee of property who assumed debt were all liable in an action to collect on promissory note).

456. *See, e.g.*, *Wellenkamp*, 582 P.2d at 976–77 (holding that a due-on-sale clause may only be enforced where the lender can demonstrate an impairment of its security interest, and in most cases the sale of the property does not endanger the security interest, only the interest-rate risk, which, as

lenders "should and do" take into account when making loans.[457]

Moreover, Congress, in enacting the Garn-St Germain Act, made the policy call: assumptions between strangers may be prevented by mortgagees, but mortgagees must honor assumptions for a select class of successors.[458] In a very narrow set of circumstances, Congress determined that exercising the due-on-sale clause would be "inequitable."[459] In the kinds of property transfers at issue in this Article, Congress determined that lenders should not be able to force a successor homeowner to obtain a new loan or face foreclosure.[460] In the judgment of Congress, it was more important to protect family homesteads than to maximize lenders' profits.

As this Article demonstrates, the legal justifications cited by servicers for refusing to work with successors ring hollow. Successor homeowners have an absolute right to assume the mortgages of their predecessors without regard to the wishes of the mortgagee or mortgage servicer.[461] Successor homeowners are entitled to information to enable them to make the decision about whether or not to assume and to more generally manage their inherited financial obligation.[462] Privacy restrictions are not a bar to information about the mortgage for successor homeowners. The right to assume is not blocked by default, and a successor homeowner has the same entitlement to be evaluated for a loan modification as any other homeowner. Bankruptcy courts have come the furthest in understanding the basic principles at work here,[463] and that analysis deserves to be more widely adopted.

As we have noted, reverse mortgages present special problems for surviving spouses. Until recently, HUD regulations required a reverse mortgage lender to foreclose on a surviving spouse if her name was not on the mortgage,[464] even if her name had been removed fraudulently from the deed by an unscrupulous mortgage broker. HUD's recent mortgagee letter

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the court noted, is "among the general risks inherent in every lending transaction").

457. *Id.* at 976.

458. *See supra* notes 214–18 and accompanying text.

459. S. REP. NO. 97-536, at 25 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3054, 3079.

460. *See supra* notes 227–36 and accompanying text.

461. *See supra* notes 241–44 and accompanying text.

462. *See supra* Part V.

463. *See generally* Johnson v. Home State Bank, 501 U.S. 78 (1991); *In re* Hutcherson, 186 B.R. 546 (Bankr. N.D. Ga. 1995); *In re* Lumpkin, 144 B.R. 240 (Bankr. D. Conn. 1992).

464. *See generally* Bennett v. Donovan, 703 F.3d 582 (D.C. Cir. 2013); Plunkett Preliminary Injunction, *supra* note 374.

provides a workable option for many surviving spouses, but HUD has failed to require servicers to broadly notify spouses of the new remedy.[465] HUD must do more to protect surviving spouses of reverse mortgage borrowers.

We have sketched out in this Article a series of policy recommendations. These recommendations, if implemented, will take the mortgage industry closer to honoring surviving spouses and other heirs. Policymakers should put in place clear requirements that servicers provide successors with key information about the loan and review successors for all loss mitigation options before requiring them to assume the debt. They should protect all successors, including those who obtain their interest in the home through the borrower's death, a transfer to the borrower's spouse or child, a divorce, or another family dissolution.

Returning to the beginning: Geraldine Bates, a seventy-year old widow grieving the death of her husband, struggled and prayed that she could get a mortgage modification to save her home.[466] Mrs. Bates and the thousands of other homeowners in her position deserve better. Getting a mortgage modification can be as challenging as cleaning the Augean stables, at best. But it does not have to be a particularly painful impossibility for the most vulnerable homeowners: seniors, the widowed, the grieving, the recently divorced. We can do better and we must.

465. *See supra* notes 381–91 and accompanying text.
466. *See supra* notes 2–8 and accompanying text.

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